IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO. 81 6633

DANNY R. BEARDEN,

Petitioner

vs.

STATE OF GEORGIA

Respondent

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SUPREME COURT U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEALS OF GEORGIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Danny R. Bearden, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in the above-entitled case on the 24th day of February, 1982. A copy of the opinion of the Court of Appeals of Georgia is found at pages 65 through 68 of the Petitioner's Appendix to this Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a violation of the Equal Protection Clause of the United States Constitution to revoke an indigent's probation for his failure to pay a fine and restitution, which payment was a condition of his probation, when the indigent person is totally unable to pay the fine and restitution?
2. If answer to the above question is in the negative the second and more specific question is: Whether it is a violation of the Equal Protection Clause of the United States Constitution to revoke an indigent's probation which is being served under the Georgia First Offender's Act (Ga. Code Ann. §27-2727 et

seq.) for his failure to pay a fine and restitution, which payment was a condition of his probation, when the indigent person is totally unable to pay the fine and restitution?

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all the parties.

JURISDICTION

The judgment of the Court of Appeals of Georgia sought to be reviewed was dated and entered February 24, 1982. The petitioner filed a timely motion for rehearing which was denied on March 15, 1982. The petitioner subsequently filed a timely petition for writ of certiorari in the Supreme Court of Georgia which was denied on April 8, 1982.

The petitioner asserts that 28 U.S.C. §1257(3) confers upon this Court jurisdiction to review this judgment of the Court of Appeals of Georgia by writ of certiorari.

REFERENCE TO PRIOR OPINIONS

There is no written opinion from the trial court or from the Supreme Court of Georgia. The citation for the opinion from the Court of Appeals of Georgia is Bearden v. State, _____ Ga. App. _____, 288 S.E.2d 662 (1982).

CONSTITUTIONAL PROVISIONS AND STATEMENTS INVOLVED

U.S. Constitution Amendment 14, §1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code Annotated §27-2727

> Upon a verdict or plea of guilty or a plea of nolo contendere but before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceeding and place the defendant on probation as provided by the Statewide Probation Act [§§ 27-2702 through 27-2726.1]. Upon violation of the terms of probation, or upon a conviction for another crime, the court may enter an adjudication of guilt and proceed as otherwise provided. No person may avail himself of the provisions of this law [§§ 27-2727 through 27-2732] on more than one occasion.
> (Acts 1968, pp. 324, 325.)

Georgia Code Annotated §27-2728

> Upon fulfillment of the terms of probation, or upon release by the court prior to the termination of the period thereof, the defendant shall be discharged without court adjudication of guilt. Such discharge shall completely exonerate the defendant of any criminal purpose, shall not affect any civil right or liberties, and he shall not be considered to have a criminal conviction. Should a person be placed under probation under this law [§§ 27-2727 through 27-2732], a record of the same shall be forwarded to the Georgia Crime Information Center. Without request of the offender, a record of discharge and exoneration, as above provided, shall in every case be forwarded to the Georgia Crime Information Center. In every case in which the record of Probation shall have been previously forwarded to the office of the State Probation System, the Georgia Crime Information Center and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of such offender has not been forwarded as above provided, upon request of the offender or his attorney or representative such record of the same shall be forwarded by the clerk of the Court so as to reflect such discharge and exoneration.
> (Acts 1968, pp. 324, 325; 1978, p. 1621, eff. July 1, 1978.)

Georgia Code Annotated § 27-2728.1

> Except as otherwise provided in this law [§§ 27-2727 through 27-2732], a discharge under the provisions of this law is not a conviction of a crime under the laws of this State and may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector.
> (Acts 1978, pp. 1621, 1622, eff. July 1, 1978.)

Georgia Code Annotated § 2-501

The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of person shall not be permitted to register, vote or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons.

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STATEMENT OF THE CASE

On October 8, 1980, Danny Bearden (hereinafter the defendant) entered pleas of guilty to felony indictments for burglary and theft by receiving stolen property. (A. 54, 50). The Honorable Robert E. Coker placed the defendant on probation for a period of three (3) and one (1) years, respectively. (A. 56, 52). This probationary period was to be served under the provisions of the First Offender's Act. Under the Georgia First Offender's Act, when a defendant successfully serves his probation he is discharged without an adjudication of guilt and is completely exonerated of any criminal purpose. Ga. Code Ann. § 27-2728.

On May 14, 1981, James H. Lohr was appointed by the Superior Court of Catoosa County, Georgia to represent the defendant in another charge of burglary, (A. 1), of which the defendant has been acquitted. On May 29, 1981, an Order was entered requiring the defendant to show cause why his probation should not be revoked. (A. 3). The petition to revoke the defendant's probation alleged that the defendant had violated the conditions of his probation by committing the crime of burglary and by failing to make a timely payment of his fine and restitution. (A. 2).

On June 3, 1981, the hearing on the Petition was heard by the Honorable Joseph E. Loggins in the Superior Court of Catoosa County, Georgia. (A transcript of the hearing is found at pages 4 through 59 of the Appendix to this Petition). At that hearing the State abandoned the first ground for revoking the defendant's probation and relied solely on the ground that the defendant had failed to pay his fine and restitution. (A. 12). The defendant's sole defense was that he was indigent and totally unable to comply with the condition of his probation which required the payment of a fine and restitution. The defendant's defense relied on the Equal Protection Clause of the United States Constitution and was raised at oral argument at the close of the evidence. After hearing the evidence, the Court found that the defendant violated the condition of his probation by "failing to pay the amount ordered to be paid by Judge Coker, and in further failing to report to the probation officer periodically." (A. 42). On these two grounds the Court revoked the defendant's probation and sentenced the defendant to serve a term in the penitentiary. (A. 60-63).

The defendant exercised his right to appeal, and filed a timely appeal with the Court of Appeals of Georgia. The defendant raised two basic issues. First, the defendant reasserted his contentions based on the Equal Protection Clause and second, the defendant contended that his probation could not be revoked for failure to report to his probation officer since that ground did not appear in the petition to revoke his probation.

The Court of Appeals, relying on prior decisions by the Georgia Supreme Court, held that it is not a violation of the Equal Protection Clause to revoke an indigent's probation for the failure to pay his fine. (A. 65-68). The Court of Appeals upheld the revocation of the defendant's probation solely on the ground that he failed to pay his fine and restitution. (A. 65-68).

The defendant filed with the Court of Appeals a timely motion to reconsider which was denied. (A. 69). A timely petition for certiorari was then filed with the Georgia Supreme Court and that petition was denied. (A. 70).

REASONS FOR GRANTING WRIT

1. The Supreme Court of Georgia and the Court of Appeals for the 11th Circuit are in conflict on the issue presented.

In the cases of Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974), and Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975), the Georgia Supreme Court held that there is no violation of the Equal Protection Clause when an indigent's probation is revoked for failure to pay a fine. Subsequently, the United States Court of Appeals for the Fifth Circuit considered this issue in a habeas corpus proceeding in the case of Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977), vacated as moot, 439 U.S. 1041 (1978). The Fifth Circuit held that "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws." Id., at 554. The cases decided by the Fifth Circuit have been adopted as precedent by the Eleventh Circuit.

After the decision by the Fifth Circuit the Georgia Supreme Court reconsidered its position in the case of Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281 (1978). Again, the Georgia Supreme Court held there was no violation of Equal Protection. With respect to the decision of the Fifth Circuit the Court stated that "it is obvious that Barnett v. Hopper misinterprets the U. S. Supreme Court's opinions and should not be applied here." Id., at 215, 239 S.E.2d at 792.

2. This Court previously granted a writ of certiorari to consider this issue but left the issue unresolved.

In the case of Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1007 (1981), this Court granted a writ of certiorari to consider "whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines." Id., at _____, 101 S.Ct. at 1100. However, in that case this court found that there was a possible conflict of interest in behalf of the petitioner's counsel and remanded the case to the lower court for further findings concerning a possible due process violation, without deciding the issue presented.

It appears that this Court would find that the Georgia Appellate Courts are in error in their interpretation of the Equal Protection Clause. Justice White in his dissenting opinion in Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1007 (1981), held that the revocation of the petitioner's probation for the failure to pay the fine violated the Equal Protection Clause. In the concurring and dissenting opinion of Justice Brennan and Justice Marshall it is stated that they would reverse the lower Court and dispose of the case because "as Justice White concludes,... Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), compels that conclusion." Id., at _____, 101 S.Ct. at 1105.

3. The decisions of the Georgia Supreme Court and the decision by the Court of Appeals of Georgia appear to be in conflict with the principals enumerated in prior cases decided by this Court.

The petitioner, Danny Bearden, asserts that it was solely because of his indigency that his probation was revoked and he was sentenced to the term in the penitentiary. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." Griffin v. Illinois, 351 U.S. 12,17 (1956). On that principal this Court considered "whether an indigent may be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence." Williams v. Illinois, 399 U.S. 235, 236 (1970). In Williams the defendant was sentenced to the maximum term provided by statute and was also fined $500.00 and $5.00 court costs. The defendant was incarcerated after he served the full term of his sentence to "work off" his fine. This Court held that once a state defines the outer limit of incarceration necessary to satisfy its penological interest, it cannot then subject a person to incarceration beyond that limit because of his indigency.

In the case of Tate v. Short, 401 U.S. 395 (1971), the defendant was imprisoned for his failure to pay fines imposed for traffic offenses. The Court held that no penal objective of the State was achieved by imprisonment since Texas did not legislate a prison term for traffic offenses. It was held that it is a violation of the Equal Protection Clause to convert a fine into a prison sentence.

Although it may be permissible for a State to impose a jail term upon an indigent in lieu of a fine "the State must make clear that the specified jail term in such circumstances is essentially a substitute for the fine and serves the same purpose of enforcing the particular statute that the defendant violated." Wood v. Georgia, 450 U.S. 261, _____, 101 S.Ct. at 1111 (1981) (Justice White dissenting). In the present case it is clear that no calculation of the type suggested by Justice White was made.

When the petitioner, Danny Bearden, was sentenced it was the determination of the Court that the penal interests of the State would be satisfied if the petitioner were to serve a total of three (3) years on probation. (A. 52, 56). There were several conditions imposed upon his probation which were also apparently necessary

to satisfy penological interests of the state. At the time the petitioner was sentenced he was apparently employed, (A. 22, 23), and the Court found it necessary to impose a fine and restitution, part of which was to be paid immediately, and the remaining portion to be paid in the future. At the time of the revocation of the petitioner's probation the court initially imposed a sentence of 5 years in the penitentiary, (A. 62, 63), beginning at the date of revocation.[1] Clearly, there was no determination by the trial court that the imposition of this longer sentence was necessary to achieve the penal interest the state supposedly had in the imposition of the fine.

In the case of San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), this Court stated that there would be a violation of Equal Protection if a class of individuals, who, "because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of meaningful opportunity to enjoy that benefit." Id., at 20. Under the present facts, the petitioner was unable to pay the amount required to retain his status as probationer under the First Offender's Act. This resulted in the loss of several substantial benefits. First, the petitioner lost his restricted and conditional liberty. Second, he lost his right to be completely exonerated of any criminal purpose upon the successful completion of his probationary period. Ga. Code Ann. § 27-2728. Third, he lost several of his civil rights including the right to vote, or hold office. Ga. Code Ann. § 2-501. Finally, he lost his rights regarding non-disqualification for employment as stated in Ga. Code Ann. § 27-2718.1.

---

1. When an individual whose probation is revoked under the Georgia First Offender's Act may, at the time of revocation, have any sentence imposed which may have originally been imposed. Ga. Code Ann. § 27-2727; Stephens v. State, 254 Ga. 835, S.E.2d (1980). In the present case the maximum term which could have been imposed was 20 years for the charge of burglary, Ga. Code Ann. § 26-1601, and 10 years for the charge of theft by receiving stolen property, Ga. Code Ann. § 26-1812. The only limitation is that defendant be properly informed of the effects of his first offender status under the guidelines set out in Stephens v. State, supra. In the present case the trial court, upon the defendant's motion, subsequently modified and reduced the sentence imposed because the requirements of Stephens v. State were not followed. (A. 64).

In summary this Court should grant a writ of certiorari to determine the issue presented because the State Court of last resort has decided a federal question in conflict with the Federal Court of Appeals, and in a way which conflicts with the principles enumerated in the applicable decisions of this Court. This is an important issue of federal law which has not been specifically decided by this Court, but should be.

Respectfully submitted,

HATFIELD, MCCOLPIN,
VAN CLEAVE & STULCE

BY: _____
Attorneys for Petitioner
428 McCallie Avenue
Chattanooga, Tennessee 37402
(615) 756-5880

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 6633

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DANNY R. BEARDEN

Petitioner

v.

STATE OF GEORGIA

Respondent

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

IN THE SUPERIOR COURT OF CATOOSA COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	NO. 8917 + 8923
VS.	:	
DANNY BEARDEN	:	Burglary
Defendant		OFFENSE CHARGED

ORDER APPOINTING COUNSEL

The above-named defendant having requested counsel and it appearing to the Court that the defendant is financially unable to employ counsel and is therefore an indigent,

IT IS ORDERED that JIM LOHR be and he is hereby appointed as counsel for the defendant in the Superior Court of Catoosa County, Georgia.

THIS 14th DAY OF May, 1981.

Filed in office
May 14, 1981
/s/ Norman L. Stone,
Clerk

D. B. [illegible]
JUDGE SUPERIOR COURT,
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT.

PETITION FOR REVOCATION OF PROBATION
DEPARTMENT OF CORRECTIONS/OFFENDER REHABILITATION

100 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30308

THE STATE

VS

Danny Ray Bearden

NO. 8923;8917 September TERM

19 80 Superior COURT

OF Catoosa COUNTY

Now comes D. L. Lomenick, District Attorney

, in the name and behalf of the State of Georgia, and
ngs this action against Danny Ray Bearden, hereinafter called the Defendant,
l shows:

I

hat the Defendant entered a plea of guilty to ~~[illegible]~~ the offense of Burglary and Theft by Receiving at the September Term,
0 .

II

at this Court, on the 8th day of October, 19 80 , did sentence the Defendant
rve as follows: Three years probation; one year concurrent; $500.00 fine and $250.00 restitution ($200.00 instanter and balance $550.00 on or before February 8, 1981).

III

at this Court, by proper order, however, permitted the Defendant to serve said sentence on probation, the and conditions of which are fully set forth in the copy of said sentence which is attached hereto, marked as it "A", and specifically incorporated herein.

IV

t the Defendant has violated the following terms and conditions of probation in the following particulars: nlawfully and without authority on the 10th day of May, 1981, enter the home of Lucy Haney, 103 on Road, in Ringgold, Catoosa County, Georgia, for the purpose of commiting a THEFT. Defendant lso failed and refused to pay fine and restitution balance of $550.00, which was to be paid on or e February 2, 1981.

V

REFORE, the State of Georgia prays that the citation for revocation of probation be served on the ant and that the Defendant be directed to appear before this Court on a day to be fixed by the Court and ime to show cause why probation should not be revoked.

27th day of April, 19 81

Ralph L. Van Pelt Jr

ORDER

laving read and considered the foregoing petition, it is hereby ordered that the Defendant be served with a
y of same and that the Defendant show cause before me on the 3rd day of June
81, at the Courthouse in Ringgold Georgia, at
1:00 P M. why said probation should not be revoked.

his 29TH day of MAY, 19 81.

Judge, Lookout Mountain Judicial Circuit

iled in office
ay 29, 1981
s/ Janice Benton,
Deputy Clerk

CERTIFICATE OF SERVICE

hereby certify that I have served a copy of the foregoing petition upon the Defendant in person (by
tered mail).

his 29th day of May, 19 81.

Lemuel C. Pippin
Asst. Sheriff, Catoosa Co.

IN THE SUPERIOR COURT OF CATOOSA COUNTY, GEORGIA

AT RINGGOLD

STATE OF GEORGIA,

Plaintiff,

-vs- CRIMINAL ACTION

DANNY BEARDEN, NOS. 8917 & 8923

Defendant.

APPEARANCES:

FOR THE STATE OF GEORGIA:

Ralph Van Pelt, Esq.,
Assistant District Attorney.

FOR THE DEFENDANT:

James H. Lohr, Esq., of
Hatfield, McColpin, Morgan,
Van Cleave & Stulce, Esqrs.,
416 Battlefield Parkway,
Fort Oglethorpe, Georgia 30741

June 3, 1981

TRANSCRIPT OF PROCEEDINGS

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BE IT REMEMBERED, the above-entitled cause came on for hearing on the 3rd day of June, 1981, before the Honorable Joseph E. Loggins, Judge of the Superior Courts, Lookout Mountain Judicial Circuit, when the following proceedings were had, and evidence introduced, to-wit:

MR. VAN PELT: This is a probation revocation, State versus Danny Bearden, in reference to No. 8917, felony indictment for burglary, 8923, a felony indictment for theft by receiving stolen property.

Mr. Bearden is being represented by Mr. Lohr in this case, Your Honor.

THE COURT: All right.

MR. LOHR: Your Honor, one preliminary matter, here. I talked with Mr. Van Pelt, and we're willing to stipulate that there has been fingerprints taken, and that there is alleged here that Mr. Bearden burglarized a trailer over on Garden Road in Ringgold. That's the basis, one of the basis for the revocation.

The results from these fingerprint analysis has not come back from the lab, and I would like to request this Court -- move this Court to continue this hearing until such time as we may get the report on the fingerprint analysis.

I have reason to believe that it may be

exculpatory in this matter.

THE COURT: When were the fingerprints sent to the Crime Laboratory?

MR. VAN PELT: It's been -- do you remember what day it was. Ken took those down there, Chief? It's been a couple of three weeks, Your Honor.

What was sent were copies of Mr. Bearden's prints and some items from the trailer that were sent. That may or may not be dispositive.

It's entirely possible that they wouldn't be able to lift a latent print from any of the items that were sent. We have some --

THE COURT: (Interposing) Are you relying upon the results of the test as to that alleged crime?

MR. VAN PELT: No, sir, not at this hearing. We're not relying on them for the basis of the revocation, no, sir.

MR. LOHR: Your Honor, I think it's pretty well established the identity of three individuals that were in that trailer. The fourth individual, I think, the dispute is over. The dispute is over who the fourth individual was in that trailer.

It would be conflicting testimony on that matter.

The reason I'm interested in those prints is to find out if in fact there are prints from the fourth

person, not the three that I believe will be established as being in that trailer, and whether or not the prints from those -- that fourth person would be Danny Bearden or some other individual. But, at this point --

THE COURT: (Interposing) But, supposing, Mr. Lohr, it comes back that there were 15 other people in that trailer, none of whom were the defendant in the case.

Are you saying that that would be the defense in the case, that this defendant didn't enter the trailer?

MR. LOHR: Yes, yes, that is the defense, Your Honor.

THE COURT: You're saying, if the defendant did in fact enter the trailer, then his fingerprints would be in the trailer on these items that were dusted, and the fingerprints taken?

MR. LOHR: I'm not saying that if he was in the trailer not necessarily will his fingerprints show. I agree to that point. The point is there may be prints of a fourth individual, I believe it will be established probably that there were four individuals in that trailer, three individuals I think the identity will not be in dispute, the fourth individual -- Mr. Bearden is accused of being that fourth individual.

The defense, I believe, he was not in the trailer, and if in fact there are prints from another individual, not these three, and not Mr. Bearden, I believe that establishes, tends to establish that Mr. Bearden was, in fact, not in the trailer.

I would just like to see the results of this test before we go on with this hearing. That's basically --

MR. VAN PELT: (Interposing) Your Honor, we have a second ground alleged in addition to the burglary.

THE COURT: I understand that, but let's stay on the fingerprint subject for the time being.

I may be wrong, but I've known a lot of cases where the defendant did in fact enter the building, but his fingerprints couldn't be found in that building.

Now, Mr. Lohr, as to these other three defendants, you say there's no question as to the identity of those three? Is that based upon fingerprints?

MR. LOHR: Well, to my knowledge, not at this point.

I believe, this is just based upon my investigation up to this point, what I believe to be. I think that's important evidence, the fingerprints.

THE COURT: I think it's important evidence if in fact they have fingerprints.

What you're -- what seems to me that your

argument is the negative, and that is that if there are no fingerprints found inside the trailer, then the defendant wasn't in that trailer, and your theory is, that if, if the defendant entered the trailer, then his fingerprints would have been found, and the Crime Lab report would show that it was his fingerprints; is that right?

MR. LOHR: No. I can -- my theory is that there were four people in the trailer, Mr. Bearden was not one of them.

I wouldn't be surprised if the Crime Lab showed prints from four individuals, and that Mr. Bearden's prints will not be among those.

You see, it's the fact that there were four individuals, that there are four different sets of prints that show up, and none of those are Mr. Bearden's, and I think if that were established, that would be exculpatory in this matter.

THE COURT: I think it would be exculpatory and it could be used, but unless the State is relying on, as a part of their case here, on the fingerprints to go forward with this case, then I don't see how a continuance is necessary in this case.

MR. LOHR: It's just evidence that we don't have at this time, Your Honor. We're not able to obtain

at this time, which we would be able to obtain upon request once the State receives the results from this lab test.

I would very much like to have that evidence available before we go ahead with this, at least this portion of the hearing.

THE COURT: If Mr. Van Pelt has stated that he is not relying on that evidence at all in this hearing, then how would it be material to this hearing if there's no evidence submitted on that point?

MR. LOHR: We have a defense to put on. It could very well be that we would want to use that evidence in the defense.

THE COURT: As to this hearing?

MR. LOHR: As to this hearing.

THE COURT: If Mr. Van Pelt is not going to use it, how can you use it as a defense?

MR. LOHR: Can't I subpoena the individuals from the Crime Lab?

THE COURT: You can anybody you want to.

MR. LOHR: I mean, that would be, that would be what I intend to do if in fact it was favorable for the defendant.

THE COURT: In any event, the Court is going to deny your request for a continuance.

Now, at such time as the State attempts in any way to use this alleged burglary for which the fingerprints would be important to you, then the Court will take it under consideration again, and might change the ruling.

MR. LOHR: With respect to this particular hearing? I understand, if I understand you correctly, that if the State relies on the basis of the burglary for the revocation, that at that time the Court will --

THE COURT: (Interposing) I will reconsider it, yes, sir.

MR. LOHR: Okay. Thank you.

MR. VAN PELT: Very well. We'll, Your Honor, in that case, we'll confine ourselves to the second ground of the revocation.

THE COURT: All right.

MR. VAN PELT: Okay. First, Your Honor, I would like to submit -- the first piece of evidence I would like to submit, S-1. It's already marked as S-1.

THE COURT: Have you shown it to defense counsel?

MR. VAN PELT: Yes, Your Honor, that's a certified copy of plea and sentence in both cases, and I believe the, the Clerk's copy of the petition shows the defendant was served with a copy of those along with a copy of the petition.

MR. LOHR: No objection.

THE COURT: All right. Let State's Exhibit 1 be admitted.

(Whereupon, the document referred to above as State's Exhibit No. 1 was received into evidence.)

MR. VAN PELT: Your Honor, I would like to call to the Court's attention that both of these are first offender sentences in both cases.

THE COURT: All right. Proceed.

MR. VAN PELT: State would call Mr. Mullis. Would you raise your right hand. Do you swear that the testimony you are about to give in this case before the Court is the truth, the whole truth and nothing but the truth, so help you God?

JACK MULLIS,

called as a witness at the instance of the State of Georgia, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VAN PELT:

Q For the record, would you state your full name and how you are employed?

A I'm Jack Mullis, and I'm the Probation Officer for the Lookout Mountain Judicial Circuit.

Q And then, what are your duties with the Probation

Office?

A Duties for the Probation Office is to supervise and collect fines and restitutions that a person is ordered to pay through our office.

Q Do you supervise and collect fines?

A Yes, sir.

Q And supervise the collection of fines in Catoosa County?

A Yes, sir.

Q And in particular, do you supervise Danny Bearden?

A Danny Bearden is on my case load, yes.

Q And pursuant to a sentence of the Court in this case, do you have any knowledge as to whether or not Mr. Bearden was ordered to pay a fine?

A Yes. He was ordered to pay a fine.

Q Do you know how much the amount of that fine was in each of the cases?

A He paid, it was $500 fine, and $200 -- $250 restitution, and he was ordered by the Court to pay a $200 instanter, which he did, and that's all he's paid, and he was to have this paid by February the 8th, 1981.

Q Okay. So, to your knowledge, and as far as you know, what the records of the Clerk of the Court reflect is that --

A (Interposing) He has not paid that.

Q (Continuing) -- he has not paid. He has paid $200?

A Yes.

Q But, has not paid anything above and beyond that?

A No.

Q Have you ever had any contact with Mr. Bearden regarding his --

A (Interposing) I'm sure that he has written letters, because we get out letters every so often about the fine and restitution and stuff like that.

Q Has he contacted you in any effort to explain why he has not been able to pay the fine?

A I don't know of any time that he has.

Q To your knowledge?

A To my knowledge.

Q To your knowledge. Do you have any knowledge of whether or not he's contacted anyone in your office?

A No, I don't. All I know is, what I can tell is that anyone that is ordered by the Judge to pay a restitution and a fine by a certain date, after that date we're -- we can issue a warrant after that date because they have been given plenty of ample time to pay that.

Q Okay. What time is reflected on the documents there in front of you? When was Mr. Bearden to have completed paying his fine by?

A He was to have completed that by February the 8th, 1981.

Q And today's date is June the 3rd?

A This is June, so he's had plenty of time to pay it. Whether we -- whether we get in touch with them or write them or anything else about their fine, they know that, it is explained to them when they're put on probation when the fine is due, and that's when it's to be paid, on or before that time, and we usually give them a little extra time to, you know, pay it on time.

Q Do you know if Mr. Bearden was aware that you were his probation officer?

A Yes. When he's written up and put on probation, they are explained, these rules, by the probation officer.

Q Okay.

MR. VAN PELT: No further questions.

THE COURT: Mr. Lohr?

CROSS EXAMINATION

BY MR. LOHR:

Q You say that $200 was paid, was paid immediately?

A Yes.

Q Do you know who paid that amount?

A No, I don't. The Clerk's Office gets a receipt for it, and it's attached to the case. The receipt is attached to the case.

Q In fact, wasn't the Court order that Mr. Bearden pay $100 immediately, and $100 on the next day?

A Well, I don't know till I review this thing. It could have been. I have so many. I couldn't tell you exactly. It could have been that way.

Q Sentence was entered on the 8th day of October; is that correct?

A October the 8th, 1980, was when the sentence was. Three years probation, one year concurrent, five hundred dollar fine, $250 restitution, a $200 instanter, and a balance $550 on or before February the 8th.

Now, I don't have a copy of the sentence here, but whatever the sentence reads, that's the way it is.

MR. LOHR: And, Your Honor, for the record, I would like to state that my copy of the sentence on Case No. 8917 states, defendant shall pay $100 of said fine instanter, and $100 of said fine on or before October 9, 1980.

THE COURT: All right. So noted. Proceed.

BY MR. LOHR:

Q You say that your office has sent letters to Mr. Bearden?

A I said it's the usual procedure that we do.

Q Do you know whether or not --

A (Interposing) No, I don't right offhand know whether I sent him a letter or not, but it's our procedure that we do.

Q Do you know whether or not -- or, excuse me -- have you had any personal contact with Mr. Bearden since October 9?

A Probably. I don't have my case -- my book with me, but probably I have, because I usually get in touch with him.

Q In fact, you cannot testify positively that you have notified Mr. Bearden?

A No. I couldn't tell you positively. I do know that he knew that he owed the fine.

Q And to your knowledge, Mr. Bearden has not contacted you or your office during this period?

A To my knowledge. I'm not saying he hasn't. He might have called and the secretary might have talked to him or something.

Q Did you issue a warrant for his arrest for violation of the probation?

A Failure to pay, yes.

Q When was that warrant issued?

A Tenth day of May, 1981. No, nineteen -- right offhand, I don't know, I would have to see the warrant. I can't recollect when I issued -- I don't have the warrant here.

Q Was the basis for that --

A (Interposing) But, I give him ample time, I always do, and I issued the warrant for failure to pay as directed

by the Court.

Now, that was after February the 8th, 1981.

Q And you did issue a warrant on that basis?

A Yes.

MR. LOHR: I have no further questions at this time.

THE COURT: All right. Anything further, Mr. Van Pelt?

REDIRECT EXAMINATION

BY MR. VAN PELT:

Q Okay. Mr. Mullis, the dates Mr. Lohr was talking about there in the sentence, he's talking about October 8th, then October 9th, when the second $100 was paid. That's the very next day?

A Oh, yeah.

Q That was to be paid, and he did pay the second $100?

A Yeah, he paid that. He paid $200.

Q And he's not paid anything since?

A No, nothing since.

Q And to your knowledge, that's what's reflected in the record of the Clerk of the Court?

A Yes.

MR. VAN PELT: No further questions.

THE COURT: All right, sir, you can step down.

MR. LOHR: Just one question, Your Honor.

RECROSS EXAMINATION

BY MR. LOHR:

Q Do you know whether Danny Bearden or some other person paid this $200?

A No, I don't. I don't know who paid it.

THE COURT: All right. Step down.

(Witness excused.)

THE COURT: Anything further from the State?

MR. VAN PELT: No, Your Honor.

THE COURT: Mr. Lohr?

MR. LOHR: Your Honor, at this time I would like to call Mrs. Jean Bearden.

THE COURT: Are there any other witnesses other than the defendant himself? He may or may not testify. Do you have any other witnesses here, Mr. Lohr, to testify?

MR. LOHR: I have some, but the only other witnesses I have would go to the burglary charge which I understand that the State has --

THE COURT: (Interposing) Gentlemen, let me say this, there was no request for the rule of sequestration to be invoked.

MR. VAN PELT: No, sir.

MR. LOHR: Did not request.

THE COURT: I don't plan to make a practice of

calling witnesses from the courtroom to testify, but inasmuch as the rule was not asked for and invoked in this hearing, witnesses may appear that have sat here and listened to this testimony.

But, I don't plan to make a practice of permitting witnesses to testify who have sat in the courtroom and heard other testimony. So, just keep that in mind.

Go ahead and take the witness stand.

MR. LOHR: Raise your right hand, please.

THE COURT: I think they do it on television, don't they, just call them out of the audience and say, come on up here and testify, but we're not on TV, I hope.

MR. LOHR: Do you swear this testimony -- evidence that you give in this case will be the truth, the whole truth and nothing but the truth?

Please be seated.

JEAN LILLIAN BEARDEN,

called as a witness at the instance of the defendant, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOHR:

Q Would you please state your name for the Court, please?

A Jean Lillian Bearden.

Q And how are you related to the defendant, Danny Bearden?

A I'm his wife.

Q Mrs. Bearden, have you and Mr. Bearden been living together and residing together since October of last year?

A We did up until January.

Q And has your husband, Mr. Bearden, been employed during that period of time?

A No, sir, he couldn't find no job.

Q Do you and Mr. Bearden own any property jointly?

A No, sir.

Q Does Mr. Bearden own any property to your knowledge?

A None as I know of.

Q Has Mr. Bearden been able to make any payment on the fine or restitution other than the $200 which was paid?

A No, sir. He was working at Rockwell International. He got laid off, and he hasn't been able to find a job since then.

Q To your knowledge, has he attempted to find a job?

A Yes. I have took him to look for jobs myself. I took him to Dalton Unemployment Office, and they didn't have nothing, and he went to look for different jobs. He has been everywhere in Ringgold to find a job, and nobody's hiring.

MR. LOHR: No further questions.

THE COURT: All right. Mr. Van Pelt?

CROSS EXAMINATION

BY MR. VAN PELT:

Q When was he laid off from Rockwell?

A It was in November, I believe.

Q November?

A Uh-huh.

Q Last year?

A Yes, sir.

Q Okay. Now, he was -- you all were married back in October, 1980?

A No. We've been married since August of '76.

Q August of '76?

A Uh-huh.

Q And you knew about when Mr. Bearden came to court on these charges in October?

A Uh-huh. I was with him then.

Q And you knew he had -- part of his sentence there was that he had to pay a fine?

A Yes, sir.

Q And you knew that?

A Yes, sir.

Q And you knew, also knew that he had a certain amount of time to pay it in; isn't that true?

A The only thing that his papers said when we got it was

he had to pay $500. It didn't say what date or nothing on it.

Q You never -- what papers?

A His probation papers.

Q Probation papers?

A Uh-huh.

Q You're saying didn't have --

A (Interposing) No definite time on it, just said pay $500.

Q Okay. And you're saying that he's attempted to find work since?

A Yes, sir.

Q He was laid off by Rockwell?

A Yes, sir.

Q Did you try and -- have you gotten in touch with anybody in the Probation Office to tell them that he was making an effort to get some money up?

A No, sir. He has been down there a couple of times, and he told them then that he hadn't had no job, but he was looking for one.

Q Where is -- where has he looked?

A He's looked in Dalton, all over Dalton carpet mills down there. He went to Babb Lumber Company, Salem Carpet, Dixie Yarn, every place in Ringgold he could think of to go to, but he still hasn't found one.

Q Are you all living together now?
A Not since he's been picked up.
Q I mean before he was arrested?
A No.
Q You weren't?
A No.
Q Were you in the process of getting a divorce?
A No, sir. We was in the process of getting back together till they come picked him up again.
Q I see. The amount that Mr. Bearden paid when he was sentenced back in October, do you know where he got that money?
A Yes, sir. He borrowed it from his mother and father.
Q Has he made any attempts to get any more money from --
A (Interposing) They're like us. They don't have the money either. His father is a retired veteran. He's disabled, and his mother, she has to stay home and take care of him.
Q How does Mr. Bearden get around? Do you all have a car?
A They have a truck.
Q Who's they?
A His mother and father.
Q Does he use it?
A Yes, sir.

Q Does he have any other way of getting to work?

A No, sir.

Q When you all were living together, where did you live? With his parents?

A No, with my mother and father.

Q Your mother and father?

A Uh-huh.

Q Okay.

MR. VAN PELT: I don't have anything further, Judge.

THE COURT: Anything further, Mr. Lohr?

MR. LOHR: Not of this witness, Your Honor.

THE COURT: All right. You can step down.

(Witness excused.)

MR. LOHR: Your Honor, at this time, we would call Mr. Bearden.

Will you raise your right hand, please?

Do you swear that the testimony that you give in this case will be the truth, the whole truth and nothing but the truth? Please be seated.

DANNY BEARDEN,

a defendant, called as a witness in his own behalf, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOHR:

Q Will you state your name for the Court?

A Danny Bearden.

Q And Mr. Bearden, referring to the sentence and the order to pay the fine on that first offender, first offender act, how much has been paid toward that?

A Two hundred dollars.

Q And who paid that $200?

A My mother and father.

Q And have you made any payment since that time?

A No, sir.

Q Why not?

A Cause I haven't had a job.

Q And what efforts have you made? Would you just please tell the Court what efforts you've made to try and find a job?

A A lot. I've walked a lot, too, to find one, and then my mother and dad came to Dalton out at Textile Rubber, and --

Q (Interposing) What places have you applied at?

A Textile Rubber and Con Agra, and over at the high school, I tried over there.

Q Which high school is that?

A One on the main drag there in Dalton at the end of Dalton.

Q And have you applied for any jobs in this area,

Ringgold?

A Yes, sir.

Q Where?

A Salem Carpet. They wouldn't even let me in the gate over there, just said they wasn't doing no hiring.

Q Any other places?

A Yes, sir. I went over here at Georgia Unemployment Office, and they didn't have any -- they told me to come back in a couple of weeks.

Q And have you received an offer for employment from any of these?

A No, sir.

Q Places that you've applied?

A I've called Textile Rubber every day.

Q And what has been the result of your contact with the Unemployment Office?

A Don't need nobody.

Q Have you been receiving any unemployment checks?

A No, sir.

Q Have you been receiving any income whatsoever?

A No, sir.

Q Where have you been living since -- from the time, from October of last year until you were arrested?

A At my mother's.

Q Do you own any property? Automobile?

A No, sir.

Q Land?

A No, sir.

Q Anything of any value?

A No, sir.

Q Mr. Bearden, is there any way that you can pay this fine -- that you could have paid this fine in the past?

A No, sir.

Q Have you attempted to contact the Probation Officer or his office with respect to this matter?

A I've called the secretary, and she said that he was out in Trenton.

Q Did you leave a message?

A I told them that I was going to be late, I'm trying to find a job and get a payment up.

Q And what was their response?

A They said we would tell them.

Q Have you received any letters or any other contact from the Probation Office?

A No, sir.

Q Not received any letters?

A No, sir.

Q Have you spoken with Mr. Mullis since the date of your sentence on October 8th, 1980?

A I've been in his office once down there when I was in

LaFayette.

Q Excuse me?

A I went in his office in LaFayette down there. It was, I think, a week after that when I got put on probation, I was supposed to went down there and got my papers and everything.

Q Did you receive your papers?

A Yes, sir.

Q Was it explained to you when and how you were to make your payments?

A Well, I can't read, and I can't hardly see. So, my wife read them to me.

MR. LOHR: I have no further questions.

THE COURT: Mr. Van Pelt?

CROSS EXAMINATION

BY MR. VAN PELT:

Q Thank you. Mr. Bearden, back in October, Judge Coker read, pronounced sentence he was imposing on you, didn't he?

A Yes, sir.

Q And he told you that you were going to have to pay a $100 that day, and $200 by the next day?

A Yes, sir.

Q And he also told you you were going to have to pay the rest of it within four months?

A Yes, sir.

Q You were represented by Mel Phillips then, weren't you?

A Yeah.

Q All right. Now, when you went to see Mr. Mullis to get your papers down there, were you -- and at the time the sentence was imposed -- were you employed then?

A No, sir.

Q Where were you living then?

A At my mother-in-law's.

Q Where were you living before you were arrested on this probation warrant?

A At my mother's.

Q At your mother's?

A Yes, sir.

Q And how long have you been living with your mother?

A With my mother?

Q Right.

A I don't know, about six months.

Q Six months?

A Yeah. Maybe less.

Q When did you move from your mother-in-law's to your mother's?

A When me and my wife separated.

Q And when was that?

A I don't know, really. I don't know what date it was.

Q Can you guess about how many months ago it was?

A Four, maybe five.

Q Four or five months ago?

A (Witness nods head up and down.)

Q Which would make it about January, end of January, early February?

A It was at the last of the month.

Q End of January or end of February?

A I don't know.

Q Now, you mentioned about five places you went hunting for work, that's five places in the last, let's see, five, eight months?

A No, sir. I went other places. I called Rockwell about -- they sent me a letter.

Q What did they say?

A To put my application in back up there in case they started rehiring.

Q All right. And you went to Conger (phonetically)? What was that?

A Joe Willard.

Q One of the other places you mentioned, what was it, Conger?

A Con Agra.

Q Con Agra. Where are they at?

A Dalton.

Q Dalton. And you went to the Dalton High School?

A Yes, sir. I went to Khyo, too.

Q Went to where?

A Kayo on 41.

Q Who did you talk to at the Dalton High School?

A It was the superintendent.

Q Superintendent?

A Yes, sir.

Q Who did you talk to at Salem?

A I never did get in Salem. They wouldn't let me in. They wasn't taking no applications. They wasn't doing any hiring.

Q How many times have you been to the Unemployment Office?

A I went twice in one day.

Q When was that?

A About the 4th of this month.

Q When you entered your plea before Judge Coker, you knew you were going to have to pay that money, didn't you?

A Yes, sir.

Q You agreed to pay it?

A Yes, sir.

Q Did you have any intention of paying?

A Yes, sir. I was going to pay it.

Q Have you made any effort to contact Mr. Mullis since February, since the time you had ran out, to tell him?

A Well, the day when it ran out is the day when I called down there.

Q It was. And you talked to the secretary?
A Yes, sir.
Q And she said he was in Trenton?
A She said she would get in touch with him. I might have assumed he was in Trenton because they was having court down there.
Q How did you know that?
A Because I just left Trenton.
Q Pardon?
A I just left Trenton.
Q You had just left Trenton. And then, you didn't make any other effort to get in touch with him?
A No, sir.
Q He told you when you got your papers that he was over here every Wednesday, didn't he?
A Yes, sir.
Q Did you come -- have you ever been by the courthouse since that phone call in February to try and get in touch with him?
A No, sir.
Q Not made any attempt to come by here?
A No, sir.
Q On any other Wednesday he's here?
A No, sir.
Q And he's here every Wednesday?

A I understood that Mr. Snow was down here, too, on Wednesday.

Q Right. Mr. Snow or Mr. Mullis or someone from the Probation Office is here in the courthouse, they told you that, didn't they?

A Yes, sir.

Q And you didn't attempt to come by the courthouse and find any of them?

A No, sir.

Q How do you survive, Mr. Bearden?

A I stay with my mother and them.

Q And they feed you?

A Till I find a job.

Q How long, just how long have you been unemployed?

A Since I got laid off at Rockwell.

Q When was that again?

A About -- it was in November, it was right before Christmas.

Q Of nineteen . . .

A Eighty.

Q Have you been through high school?

A No, sir.

Q What was the last grade you attended?

A Ninth.

Q Okay. Are you disabled in any way?

A No, sir.

MR. VAN PELT: No further questions, Your Honor.

THE COURT: All right. Anything further, Mr. Lohr?

REDIRECT EXAMINATION

BY MR. LOHR:

Q Mr. Bearden, have you been able to afford to hire a lawyer to represent you?

A No, sir.

Q Have I been appointed by the Court?

A Yes, sir.

THE COURT: You may step down.

THE WITNESS: Okay.

(Witness excused.)

THE COURT: Anything further?

MR. LOHR: No further witnesses, Your Honor.

THE COURT: Anything in rebuttal?

MR. VAN PELT: Nothing, Your Honor.

MR. LOHR: Your Honor, I just would like to bring a couple of things to the Court's attention before --

THE COURT: (Interposing) Something that's been presented?

MR. LOHR: Just argument. That's all.

THE COURT: I'll hear from you very, very briefly, but it will be briefly.

(Whereupon, counsel for the State of Georgia and counsel for the defendant made closing statements to the Court.)

THE COURT: Of course, Mr. Bearden and Mr. Lohr, it's not my desire to revoke your probation. These matters, so far as I am concerned, are the worst part of my job.

Certainly $550 or $5,500 doesn't necessarily mean the difference between you serving a sentence in prison or being on probation, except this Court previously on October the 8th, 1980, ordered these payments to be made as a condition of your probation.

Now, I know that a lot of times it's hard to find work, and I know that there are times when a person really and truly tries, tried hard, and they can't find the type work that they want, or sometimes they can't find any regular work, but yet, almost daily, people go down to the courthouse in Chattooga County, and I'm sure it's true in this county, looking for somebody to do some work for them, maybe mow their grass, maybe do an odd job for which they would pay them some money. They can't find anybody to work. I don't know where those people are looking for work when people who are looking for somebody to work for them.

I'm assuming in this case that one of the conditions of probation was that the defendant report to the Probation Office periodically.

MR. VAN PELT: Yes, sir. That's in the -- in S-1.

THE COURT: In S-1.

MR. VAN PELT: I believe it is. It's the same as on the other one. I may be wrong.

THE COURT: I don't see the condition in this sentence requiring this defendant to report to the probation officer every 30 days, but I believe the testimony of the probation officer was that the terms of the condition of probation were explained to him. Is that the testimony or not?

MR. VAN PELT: Yes, sir, I believe it was.

THE COURT: If there is any dispute about it, we can go back on the record and find out what the testimony was. I don't feel that this defendant has really in good faith reported to the probation officer on any type of regular basis.

Mr. Mullis testified in general terms as to what is generally explained to people on probation, and as I recall it, that this defendant was informed of that. Was that the testimony or not?

MR. LOHR: Your Honor, as I remember it, I'm

just -- from what I'm trying to recollect, that he generally said that the terms of probation were explained, but he did not go into any detail except with respect to the amount of the fine, and the aspect of reporting to the probation officer.

I don't think there was any testimony that that was one of the conditions of probation, nor that that particular part had been explained to him. I don't remember. I'm just trying to go back and remember.

THE COURT: But, the defendant himself testified that he was given some papers, and that his wife read them to him. Is that not right?

MR. LOHR: I believe that was his testimony.

MR. VAN PELT: Yes, sir. We don't have those papers in evidence. I don't know what the contents of them were. I don't know which papers they were.

Your Honor, I believe that there was testimony from Mr. Mullis that Mr. Bearden was written up at the time of the sentence. I don't believe there was any specific date for reporting testified to.

THE COURT: I know that usually, quote, the papers, end of quote, that are given, usually contain those provisions that they're to report, I believe, every 30 days, but I'm not sure.

Mr. Mullis, would you come back to the witness

stand, please?

JACK MULLIS,

recalled as a witness at the instance of the State of Georgia, being previously duly sworn, was examined and testified further as follows:

MR. MULLIS: Your Honor, I might clear this up to say, now, he mentioned Mr. Snow. Mr. Snow might have written him up, I don't know, because we both serve this county, but usually everybody that's put on probation, Judge Coker several years ago fixed out some rules of probation, and asked us to read these rules to everybody that's put on probation, which I do.

THE COURT: Do you have a copy of the rules that are given to each person that's put on probation?

MR. MULLIS: Yes, sir.

THE COURT: Do you have a copy of that?

MR. MULLIS: Yes, sir.

THE COURT: Would you get a copy of it?

MR. MULLIS: I sure will.

THE COURT: I reiterate, I don't know what's in probation, but if the prior orders of the Court aren't enforced, then I don't know any other way to do it, if they're not complied with, I don't know any other way, Mr. Lohr.

MR. LOHR: Your Honor, I have been in -- since

I've been involved with this case, I've been in contact with his family and his brother has told me he would do everything possible to get this amount.

THE COURT: Beg your pardon?

MR. LOHR: His brother has told me that he will do whatever he can to get this $550 to pay it for Danny.

Now, when I spoke with him before today, he indicated he would try to have it today, subsequently found out he was not able to obtain it, and it might be possible that this Court would consider giving Mr. Bearden or his family some time, I don't know how much it would take, a few days, in which to pay this off.

There's no dispute that he has not paid it, and did let it slide, but he's willing to pay it, and his family is willing to pay it as soon as they can get the money.

THE COURT: That's well and good, Mr. Lohr, but, of course, the fallacy in that argument is, since October the 8th, 1980, this defendant has known that on or before February the 8th, he was required to pay this.

I know, and I hate to see $550 or the lack of $550, put this boy in prison. I hate to see anybody

go to prison when the jury finds them guilty of armed robbery, I hate to see them go to prison, but those are the laws that you're bound by. I'm bound by the same laws.

So, Mr. Bearden, we all live by laws and not of men, and I don't know any way to enforce the prior orders of the Court but one way.

MR. LOHR: Well, I guess my only response to that, Your Honor, would be that the law requiring revocation of probation when an indigent is unable to pay a fine is an invalid law.

THE COURT: I'm well aware of the indigency provision, and I know that there are times when a person doesn't have funds that he's supposed to have, but in any event, the Court finds that this defendant has failed to abide by the previous order of this Court of Judge Coker on October the 8th, 1980, in failing to pay the amount ordered to be paid by Judge Coker, and in further failing to report to the probation officer periodically.

That's the order of the Court.

MR. VAN PELT: Thank you, Your Honor.

THE COURT: Mr. Bearden, I'm sure, or at least I feel confident that Judge Coker explained to you, and probably Mr. Phillips explained to you at the time

Judge Coker imposed this first offender's sentence, what it meant.

Do you care to respond to that, Mr. Lohr?

MR. LOHR: Your Honor, I don't know what Mr. Coker has stated and -- excuse me -- Judge Coker and Mr. Phillips.

I have conferred with Danny, and I told him that as it stands as if he was at the day of his plea, that this Court would sentence him at this time.

THE COURT: Of course, you weren't here and you don't know what was explained to Mr. Bearden at the time of the sentence.

MR. LOHR: Right.

THE COURT: Now, if in fact, if in fact under the case of Stevens versus the State at 245 Georgia Reports, page 835 -- would someone go to the library, the law library, here, and get 245 Georgia Reports, under the case of Stevens versus the State -- unless it was clearly explained to Mr. Bearden that in the event the provisions of this probation were not complied with, that he could be sentenced in the burglary case anywhere from 1 to 20 years, and in the theft by receiving, anywhere from 1 to 10 years, if that was not explained to him by Judge Coker at the time, or written into the sentence at that time, then, of course, the

only period of time by which this Court can now revoke the probation would be the remaining portion. He was given three years sentence on October the 8th, 1980.

Are you familiar with the Stevens case, Mr. Lohr?

MR. LOHR: Your Honor, I'm not. What is the page number?

THE COURT: 835. 245 Georgia Reports, page 835. Our Supreme Court has held that the purpose of the first offender's act is to give the defendant another chance to speak.

In the Stevens case, the judge, the sentencing judge, told the defendant that if he brought -- if he violated a term of probation, that he would have to serve the remainder of the sentence if he was brought back into court for violation of the terms of the probation.

All right. Mr. Stevens was in fact brought back into court and resentenced and given a longer sentence than the remainder of his original term of sentence, and our Supreme Court has said, you can't do that.

But, if in fact in this case Mr. Bearden was informed by the Court that if he violated the terms of the first offender's act and was brought back into court, the Court at the time Mr. Bearden was brought back could impose a sentence in the burglary case

anywhere from 1 to 20 years, and in the theft by receiving case, anywhere from 1 to 10 years, then, of course, this Court at this time could impose a longer sentence than a period from October the 8th up to the present time.

But, I want to make it clear that between October the 8th, 1980, and up to this date, Mr. Bearden will be given credit for that period of time serving that sentence.

Am I making myself clear or am I confusing you more?

MR. LOHR: No. I understand exactly what you're saying, I believe.

THE COURT: Mr. Lohr, on behalf of the defendant, do you care to confer with the defendant and then respond, or would you prefer that I have the record checked to determine what information and what statements were made to Mr. Bearden at the time he was sentenced?

MR. LOHR: Your Honor, let me confer with him and see if he recalls what is said.

THE COURT: All right. There is a record of it because at the time Mr. Bearden entered his first offender's plea in each of these cases on October the 8th, 1980, there will be a record of it, and we can

get it. I don't know which reporter it would have been, but we can get it.

MR. LOHR: Give me just a moment, if you would, please.

THE COURT: All right, sir.

MR. LOHR: Your Honor, I suppose the only way to be sure is to check the record on it. He does not remember what Judge Coker told him specifically which I can, of course, understand, but he cannot testify one way or the other.

THE COURT: All right. The Court at this time then will impose a sentence which will be the sentence that will stand in the event the Judge at that time, Judge Coker, made the proper explanation to him, which I assume he did.

Then, if it develops that the proper explanation was not given to Mr. Bearden at that time, then I will amend the sentence and comply with the direction of our Supreme Court in the case of Stevens versus the State at 245 Georgia Reports, page 835.

There are several other cases that hold the same thing as the Stevens case, but that's just one that I happened to remember.

All right. Come around, Mr. Bearden, and Mr. Lohr.

As to Case No. 8917, the State versus Danny Bearden for the offense of burglary, now, Mr. Bearden, you understand I'm now sentencing you to prison, the same as Judge Coker could have done on October the 8th, 1980, do you realize that?

MR. BEARDEN: Yes, sir.

THE COURT: It is the sentence of the Court that the defendant, Danny Bearden, serve a period of five years in the State Penitentiary or such other place or places as the Director of the Board of Corrections directs.

As to Case No. --

MR. VAN PELT: (Interposing) 8923.

THE COURT: Is that 8923?

MR. VAN PELT: Yes, sir.

THE COURT: 8923, State versus Danny Bearden for the offense of theft by receiving, it's the sentence of the Court that the defendant serve a period of three years in the State Penitentiary or such other place or places as the Director of the Board of Corrections directs.

However, Case No. 8923 is to be served concurrent with Case No. 8917. You'll be serving both sentences at the same time.

MR. BEARDEN: Yes, sir.

THE COURT: Now, Mr. Bearden, let me explain to you, you have the right to appeal to our Appellate Courts. If you desire to appeal, you must do so within 30 days from this date, and if you do not appeal within 30 days, then you would lose the right to appeal.

If you desire to appeal and you do not have the funds with which to pay a lawyer to appeal your cases, the Court will appoint a lawyer for that purpose.

You also have a right to seek a review of the sentence in Case No. 8917.

Now, if you desire to seek a review of this sentence, you must do so within 30 days or you would lose that right. Do you understand it?

MR. BEARDEN: Yes, sir.

THE COURT: All right. Do you have any questions that you want to ask me?

MR. BEARDEN: No, sir.

THE COURT: All right, sir. Now, I will ask the Court Reporter to ascertain which court reporter was here on October the 8th, 1980, and go back to these two cases where the pleas were entered, and get an excerpt of that portion of what was told by the Court to Mr. Bearden relative to what would happen to him if he violated any of the laws of the State or country, and was brought back into court.

It's very crucial, that point is very crucial, more crucial to Mr. Bearden than anyone else.

All right. That is the sentence of the Court.

(Hearing concluded.)

WITNESSES:

In addition to any persons named in the body of this instrument.

KEN HALE.....Prosecutor
C.C.S.O.

STEVE PAUKERT, MNGR.
c/o RODEWAY INN
133 W. BURNSIDE
POCATELLO, IDAHO 83201
(208) 237 - 0020

MARK SAUNDERS

JOSEPH LYNN ELLIS
32 TIMBER RIDGE TRAIL
RINGGOLD, GA

DOUG JONES
c/o DAYS INN MOTEL
GA HWYS. 146 & I-75
RINGGOLD, GA
891 - 9910

MIKE GARD
C.C.S.O.

SEE ADDITIONAL WITNESSES

No. 8923

SUPERIOR COURT

CATOOSA County

SEPTEMBER Term, 1980

THE STATE
—vs.—

DANNY BEARDEN

FELONY
INDICTMENT
for

THEFT BY RECEIVING STOLEN PROPERTY

true BILL

Nora Robbs Foreman

11th day of September, 1980

CATOOSA COUNTY, GA.
FILED IN OFFICE
9/11 1980

WILLIAM H. (BILL) CAMPBELL
District Attorney

Norman L. Stone

49

ADDITIONAL WITNESSES:

The Defendant DANNY BEARDEN

waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of 4 Jurors and pleads ~~guilty~~ not guilty. DB

Danny Bearden
Defendant

W. M. Phillips
Defendant's Attorney

WILLIAM M. (Bill) CAMPBELL, District Attorney

A. R. BROOKS J.P.

We, the Jury, find the Defendant ----------

This ----- day of ----------, 198---.

FOREMAN

GEORGIA, CATOOSA COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS SELECTED, CHOSEN AND SWORN FOR SAID COUNTY, TO-WIT:

1. [illegible] Foreman
2. [illegible]
3. [illegible]
4. [illegible]
5. [illegible]
6. [illegible]
7. [illegible]
8. [illegible]
9. [illegible]
10. [illegible]
11. [illegible]
12. [illegible]
13. [illegible]
14. [illegible]
15. [illegible]
16. [illegible]
17. [illegible]
18. [illegible]
19. [illegible]
20. [illegible]
21. [illegible]
22. [illegible]
23. [illegible]

IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA, CHARGE AND ACCUSE

DANNY BEARDEN

with the offense of FELONY, for that the said DANNY BEARDEN

did on the 11TH day of JULY in the year of our Lord Nineteen Hundred and Eighty in the County aforesaid, did unlawfully RECEIVE AND RETAIN STOLEN PROPERTY, TO WIT: ONE (1) RCA VCR VIDEO RECORDER, MODEL VBT 200, SERIAL NUMBER 7384HM128, THE PROPERTY OF STEVE PAUKERT, WITH A VALUE OF $1,000.00, KNOWING SAID PROPERTY WAS STOLEN, SAID PROPERTY NOT HAVING BEEN RECEIVED AND RETAINED WITH INTENT TO RESTORE IT TO THE OWNER,

y to the laws of said State, the good order, peace and dignity thereof.

WILLIAM N. (BILL) CAMPBELL
District Attorney

IN THE SUPERIOR COURT FOR THE COUNTY OF Catoosa

STATE OF GEORGIA

THE STATE OF GEORGIA

VS.

Danny Bearden

DEFENDANT.

CASE NO. 8423

Catoosa TERM, 1980

OFFENSE: Theft by Receiving

ORDER OF COURT UNDER FIRST OFFENDER'S ACT

The Defendant, Danny Bearden, having entered his plea of guilty in the above case and the Court, prior to an adjudication of guilt, finds that the Defendant has not been previously convicted of a felony, and the Court without entering a judgment of guilt against the Defendant, and with the consent of the Defendant, does hereby defer further proceedings in this case and places the Defendant on Probation as provided by the Statewide Probation Act (Sections 27-2702 through 27-2726.1), for a period of One (1) years, upon payment of a fine of $_____, $_____ costs, and restitution in the amount of $200.00. Said $200.00 restitution shall be paid within Four (4) months of October 8, 1980.

Upon violation of the terms of probation, or upon a conviction for another crime, the Court may enter an adjudication of guilt and proceed as provided by law.

Provided, however, that the said defendant, during the term of this probation unless shall report to the Probation Officer of the Lookout Mountain Circuit as may be directed by the Court or said Probation Officer, not to leave the jurisdiction of this Court without the permission of this Court, and shall avoid no unlawful behavior and use and purchase same and shall keep no company with persons of bad reputation, avoid places of disreputable character, and visit the places where alcoholic beverages or drinks or narcotics are sold, and shall permit the Probation Officer to visit him there at home or elsewhere at any time, and shall work faithfully at suitable employment whether as possible, and shall violate no penal laws of this State or any state of the federal government, or municipal ordinance and be of general good behavior, and shall observe such other conditions as are herein specified, and as may from time to time be required by the Court or Probation Officer.

and shall

This Order is imposed pursuant to the provisions of Sections 27-2727 and 27-2728 of the Code of Georgia, Annotated.

FURTHER ORDERED that a copy of this Order be forwarded to the office of the State Probation System and the Identification Section of the Federal Bureau of Investigation.

ENTERED, this 5th day of October, 1953.

Robert E. Oker
JUDGE OF THE SUPERIOR COURT
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

WE HEREBY CONSENT TO THE WITHIN ORDER.

Danny Brewton
DEFENDANT

William M. Phillips
ATTORNEY FOR DEFENDANT

WITNESSES:

In addition to any persons named in the body of this instrument.

KEN HALE ..... Prosecutor
C.C.S.O.

MARTHA KUNGERGER
LOT 8, RT. 8
HICKORY GROVE TRLR. PARK
RINGGOLD, GA
DONNA M. STEVENS
301 A, INMAN ST.
RINGGOLD, GA
NORMAN HANSEN
C/O DAYS INN MOTEL,
GA HWYS. 146 & I-75
RINGGOLD, GA
MRS. DANNY BEARDEN

GEORGE BROWN
C.C.S.O.
J. D. STEWART
HAROLD BRADFORD
A. B. BROOKS
C.C.S.O.

SEE ADDITIONAL WITNESSES

No. 8917

SUPERIOR COURT

CATOOSA ..... County

SEPTEMBER ..... Term, 198 0

THE STATE
—vs.—

DANNY BEARDEN

FELONY
INDICTMENT
for

BURGLARY

True ..... BILL

Nora Robbs ..... Foreman

11th day of September, 198 0

CATOOSA COUNTY, GA.

Filed
Sept 11

WILLIAM R. (BILL) CAMPBELL
District Attorney

Norman L. Stone

The Defendant DANNY BEARDEN

waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of ____ Jurors and pleads ~~guilty~~ M.C. DB guilty.

Danny Bearden
Defendant

W M Phillips
Defendant's Attorney

WILLIAM M. (Bill) CAMPBELL, District Attorney

A. R. BROOKS J.P.

We, the Jury, find the Defendant _____

This _____ day of _____ 198____

_____ FOREMAN

...ICTMENT

GEORGIA,.....CATOOSA.....COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY
THE GRAND JURORS SELECTED, CHOSEN AND SWORN FOR SAID COUNTY, TO-WIT:

1. Nora Roberts Foreman
2. Martha Tuggle
3. Steve Simmons
4. Donald R. Simmons
5. Malcolm L. Thompson
6. Wayne M. Templeton
7. Sandra Thomas
8. Alma C. Callahan
9. William B. Chase
10. Edith B. Land
11. Henrietta E. Patton
12. Margaret Hinton
13. Barbara Canales
14. Herman & Martha
15. Charles E. Thompson
16. Steve E. Choate
17.
18.
19.
20.
21.
22.
23.

IN THE NAME AND BEHALF OF THE CITIZENS OF GEORGIA, CHARGE AND ACCUSE

DANNY BEARDEN

with the offense of FELONY, for that the said DANNY BEARDEN

did on the 7TH day of JULY in the year of our Lord Nineteen Hundred and Eighty
in the County aforesaid, did unlawfully AND WITHOUT AUTHORITY AND WITH INTENT TO COMMIT A THEFT THEREIN, ENTER THE MOBILE HOME DWELLING HOUSE OF MARTHA KUNGERGER, THE LAWFUL OCCUPANT THEREOF, SAID MOBILE HOME DWELLING HOUSE BEING THEN AND THERE LOCATED AT LOT 8, ROUTE 8, HICKORY GROVE TRAILER PARK, RINGGOLD, CATOOSA COUNTY, GEORGIA,

WILLIAM H. (BILL) CAMPBELL

IN THE SUPERIOR COURT FOR THE COUNTY OF Catoosa

STATE OF GEORGIA

THE STATE OF GEORGIA

VS.

Danny Braden

DEFENDANT.

CASE NO. 8917

September TERM, 19 81

OFFENSE: Burglary

ORDER OF COURT UNDER FIRST OFFENDER'S ACT

The Defendant, Danny Braden, having entered his plea of Guilty in the above case and the Court, prior to an adjudication of guilt, finds that the Defendant has not been previously convicted of a felony, and the Court without entering a judgment of guilt against the Defendant, and with the consent of the Defendant, does hereby defer further proceedings in this case and places the Defendant on Probation as provided by the Statewide Probation Act (Sections 27-2702 through 27-2726.1), for a period of Three (3) years, upon payment of a fine of $ 500.00, $ _____ costs, and restitution in the amount of $ 50.00. ~~Defendant~~ shall pay $100.00 of said fine in Nov. and $100.00 of said fine on or before Oct. 1st remaining $250.00 of said fine and restitution shall be paid ~~_____~~ within Four (4) months of October 8, 1982

Upon violation of the terms of probation, or upon a conviction for another crime, the Court may enter an adjudication of guilt and proceed as provided by law.

Provided, however, that the said defendant, during the term of this probation sentence shall report to the Probation Officer of this Lookout Mountain Circuit as may be directed by the Court or said Probation Officer, not to leave the jurisdiction of this Court without the permission of this Court, and shall drink no alcoholic beverages nor use any narcotics nor persons same, and shall keep no company with persons of bad reputation, avoid places of disreputable character, and visit no places where alcoholic beverages or drinks or narcotics are sold, and shall permit the Probation Officer to visit him/her at home or elsewhere at any time, and shall work faithfully at suitable employment whether or possible, and shall violate no penal laws of this State or any state of the federal government, or municipal ordinance and be of general good behavior, and shall observe such other conditions as are herein specified, and as may from time to time be required by the Court or Probation Officer,

and shall

This Order is imposed pursuant to the provisions of Sections 27-2727 and 27-2728 of the Code of Georgia, Annotated.

Pictorial Exhibit No. 1

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FURTHER ORDERED that a copy of this Order be forwarded to the Office of the State Probation System and the Identification Section of the Federal Bureau of Investigation.

ENTERED, this 6th day of October, 19 50.

Robert E. Baker
JUDGE OF THE SUPERIOR COURT
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

WE HEREBY CONSENT TO THE WITHIN ORDER.

Dewey Bruton
DEFENDANT

William M. Phillips
ATTORNEY FOR DEFENDANT

State's Exhibit No. 1

9

CERTIFICATE EXEMPLIFICATION OF RECORD

STATE OF GEORGIA, CATOOSA COUNTY

CLERK'S OFFICE—ss.

I, NORMAN L. STONE, Clerk Superior Court of Catoosa County, do hereby certify that I have compared the foregoing copy of Indictments, Pleas and Sentences (First Offender) in Criminal Action 8923,

The State vs. Danny Bearden, charged with the offense of Theft by Receiving Stolen Property and Burglary.

with the original record thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record, and that this Court is a Court of Record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this the 29 day of May, 19 1

Norman L. Stone
Clerk Superior Court, Catoosa County.

54

State's Exhibit No. 1

OFFICIAL CERTIFIED COURT REPORTER'S CERTIFICATE

I, Scottie R. Hood, Official Certified Court Reporter of the Lookout Mountain Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings on June the 3rd, 1981, in the case of The State of Georgia versus Danny Bearden, and that the said proceedings were reduced to typewriting under my direct supervision.

This 30th day of June, 1981.

Scottie R. Hood

SCOTTIE R. HOOD, Official Certified Court Reporter, Lookout Mountain Judicial Circuit.
Certificate No. B-484.

IN THE SUPERIOR COURT OF CATOOSA COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	INDICTMENT NUMBERS:
VS.	)	8917, 8923
DANNY BEARDEN	)	BURGLARY, THEFT BY RECEIVING

ORDER

THE ABOVE CASE HAVING COME ON TO BE HEARD BY THIS COURT ON THE STATE'S PETITION FOR REVOCATION OF PROBATION ON MARCH 3, 1981, AND AFTER HEARING EVIDENCE AND THE ARGUMENTS OF COUNSEL, AND AFTER CONSIDERING AND ASSESSING THE CREDIBILITY OF EACH AND ALL OF THE WITNESSES WHO TESTIFIED, THIS COURT FINDS AS FOLLOWS:

1.

THIS COURT HEREBY FINDS AS A MATTER OF FACT, FROM A PREPONDERANCE OF THE EVIDENCE PRODUCED AT THE ABOVE HEARING, AS FOLLOWS:

A.

THAT ON OCTOBER 8, 1980, THE DEFENDANT ENTERED PLEAS OF GUILTY UNDER THE FIRST OFFENDER'S ACT TO EACH OF THE ABOVE FELONY INDICTMENTS ALLEGING BURGLARY AND THEFT BY RECEIVING.

B.

THAT THE DEFENDANT WAS REPRESENTED BY COUNSEL AT THE TIME SAID PLEAS WERE ENTERED AND THAT THE PLEAS WERE KNOWINGLY AND VOLUNTARILY ENTERED.

C.

THAT BASED ON THOSE PLEAS, THE COURT SENTENCED THE DEFENDANT TO SERVE A TERM OF THREE (3) YEARS UNDER THE FIRST OFFENDER'S ACT AS TO INDICTMENT NUMBER 8917, CONDITIONED UPON PAYMENT OF A $500.00 FINE, AND $50.00 RESTITUTION, TO BE PAID WITHIN FOUR (4) MONTHS OF THE DATE OF SENTENCING. DEFENDANT WAS FURTHER SENTENCED TO SERVE A TERM OF ONE (1) YEAR UNDER THE FIRST OFFENDER'S ACT AS TO INDICTMENT NUMBER 8923, CONDITIONED UPON PAYMENT OF $250.00 RESTITUTION, ALSO TO BE PAID WITHIN FOUR (4)

D.

THAT AS OF THE DATE OF THE ABOVE HEARING ON JUNE 3, 1981, THE DEFENDANT HAD PAID ONLY $200.00 TOWARD THE $750.00 TOTAL OF FINES AND RESTITUTION WHICH HE HAD BEEN ORDERED TO PAY BY FEBRUARY 8, 1981, AS A CONDITION OF HIS PROBATION.

E.

THAT THE DEFENDANT HAD ALSO FAILED TO REPORT TO HIS PROBATION OFFICER AS DIRECTED.

2.

THIS COURT FURTHER FINDS AS A MATTER OF LAW THAT THE FAILURE TO PAY FINES AND RESTITUTION ORDERED AND FAILURE TO REPORT CONSTITUTED A VIOLATION OF THE EXPRESS TERMS AND CONDITIONS OF THE DEFENDANT'S SENTENCE OF PROBATION UNDER THE FIRST OFFENDER'S ACT ENTERED ON OCTOBER 8, 1980.

3.

IT IS THEREFORE ORDERED THAT THE DEFENDANT'S SENTENCE OF PROBATION UNDER THE FIRST OFFENDER'S ACT BE REVOKED AND THE DEFENDANT IS REMANDED TO THE CUSTODY OF THE DIRECTOR OF THE DEPARTMENT OF OFFENDER REHABILITATION FOR EXECUTION OF THE SENTENCE ENTERED PURSUANT TO THE FIRST OFFENDER'S ACT.

THIS 19th DAY OF June, 1981.

Joseph E. Loggins

JOSEPH E. LOGGINS
JUDGE, SUPERIOR COURT
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

Filed in office
June 25, 1981
/s/ Mary R. Sutherland,
Deputy Clerk

SENTENCE

THE STATE

vs.

Ly Bearden

No. 8917

Catoosa SUPERIOR COURT

DETERMINATE SENTENCE

TERM Five (5) YEARS

OFFENSE Burglary

PLEA: NOT GUILTY First Offender Treatment GUILTY

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT:

That the Defendant serve the full term of 5 (years) (months) in the Penitentiary or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. Said Sentence to run CONCURRENTLY—CONSECUTIVELY to _____

That the defendant be confined at work at a Public Works Camp or elsewhere as the law directs for a period of _____ months; and that the defendant be confined in the common jail of said County for a period of _____ months, to be computed as provided by law.

However, it is ordered that the defendant be relieved of and discharged from the foregoing imprisonment upon payment of a fine of $_____ $_____ costs.

However, the defendant is given leave to serve the _____ said sentence outside of said penitentiary, Public Works Camp, and fail on Probation upon payment of a fine of $_____ $_____ costs.

Provided, however, that the said defendant, during the term of this probation sentence shall report to the Probation Officer of the Lookout Mountain Judicial Circuit as shall be directed by the Court or said Probation Officer, and to serve the jurisdiction of the Court without the permission of the Court, and shall abide by the standard conditions that are now prescribed by the Probation Office of this Court, and such other conditions, and from time to time, and shall work faithfully at suitable employment as far as possible, and shall support his dependents, and shall remain within a specified area, and shall not leave such area without the consent of the Probation Officer or further order of the Court, and shall not violate any penal laws of this State or any State of the United States or any county, municipal ordinance and be of good behavior, and shall observe such rules and regulations as may from time to time be required by the Court or Probation Officer and shall

This 3d day of June, 1981

[redacted], District Attorney

[redacted] David L. Lominick, Jr.

Joseph E. Loggins

Judge, Superior Court, Lookout Mountain Judicial Circuit

SENTENCE

THE STATE

vs.

Danny Bearden

No. 8923

Catoosa SUPERIOR COURT

DETERMINATE SENTENCE

TERM Three (3) YEARS

OFFENSE Theft by Receiving

PLEA: NOT GUILTY Entered by Plea GUILTY

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT:

That the Defendant serve the full term of 3 (years) in the Penitentiary or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. Said Sentence to run CONCURRENTLY ~~CONSECUTIVELY~~ to # 8917 (Burglary) c

That the defendant be confined at work at a Public Works Camp or elsewhere as the law directs for a period of _____ months, and that the defendant be confined in the common jail of said County for a period of _____ months, to be computed as provided by law.

However, it is ordered that the defendant be relieved of and discharged from the foregoing imprisonment upon payment of a fine of $_____ & _____ costs.

However, the defendant is given leave to serve the _____ said sentence outside of said penitentiary, Public Works Camp, and jail on Probation upon payment of a fine of $_____ & _____ costs.

Provided, however, that the said defendant, during the term of this probation sentence shall report to the Probation Officer of the Lookout Mountain Circuit or that be directed by the Court or said Probation Officer, not to leave the jurisdiction of the Court without the permission of the Court, and shall defend no disorderly houses nor any are gamblers nor persons who [illegible] and shall keep no company with persons of bad reputation, and shall not frequent such places, and not go places where disorderly persons are permitted to be, and shall keep sober, and refrain from visiting places of [illegible] or elsewhere at any time, and shall work faithfully at suitable employment provided or procured, and shall pattern the Probation Officer in all his or any state or the federal government, or municipal ordinance and be of general good behavior, and shall observe such other conditions as are herein specified, and as may from time to time be imposed by the Chattooga Probation Officer.

and shall

This 31 day of June, 19 81

[redacted], District Attorney

L. M. Campbell

Judge Superior Court, Lookout Mountain Judicial Circuit

IN THE SUPERIOR COURT OF CATOOSA COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
Plaintiff	*	CRIMINAL ACTION
VS	*	NOS: 8917 and 8923
DANNY BEARDEN	*	
Defendant	*	

ORDER

The Defendant's Motion to Modify Sentence in the above cases having come to be heard by this Court on the 9th day of September, 1981, and it appearing upon a hearing of said motion that the record of these cases does not show that the Defendant was properly instructed as to the possible results of the revocation of his probation at the time the Defendant entered his pleas of guilty under the First Offenders Act on October 8, 1980,

IT IS THEREFORE ORDERED that the Defendant's sentences as entered by this Court on the 3rd day of June, 1981, are hereby modified and amended as follows: The Defendant shall serve the remaining time of his probation as specified in the Court orders entered in the above cases and dated the 8th day of October, 1980, in the penitentiary or such other institutions the Director of the State Board of Corrections may direct, to be computed as provided by law.

This the 17th day of September, 1981.

Joseph E. Loggins

JOSEPH E. LOGGINS
Judge, Superior Court
Lookout Mountain Judicial Circuit

FEB 24 1982

62930. BEARDEN v. THE STATE. P-209

POPE, Judge.

Danny Ray Bearden appeals the revocation of his probation. He enumerates as error the revocation of his probation on a ground not asserted in the petition to revoke his probation. He also enumerates a violation of the Constitution in the trial court's revocation of his probation on the ground that he had failed to pay the fine and restitution assessed.

On October 8, 1980 appellant pled guilty to the offenses of theft by receiving stolen property and burglary. He was placed on probation as a first offender pursuant to Code Ann. § 27-2727. For the offense of theft by receiving stolen property, he was required to serve one year on probation upon payment of $200.00 restitution, said restitution to be paid within four months of October 8, 1980. For the offense of burglary he was required to serve three years on probation upon payment of a fine of $500.00 and restitution in the amount of $50.00; appellant was required to pay $200.00 of the fine almost immediately and $350.00

comprising fine and restitution within four months of October 8, 1980. The state moved on May 27, 1981 to revoke appellant's probation on the grounds that he had committed a burglary on May 10, 1981 and also that he had failed to pay the $550.00 balance of the foregoing fine and restitution. Following a hearing on the petition on June 3, 1981, the trial court found that appellant had not paid the required fine and restitution and also found that appellant had failed to report to his probation officer as directed." The trial court revoked appellant's probation and sentenced him to concurrently serve five years for the offense of burglary and three years for the offense of theft by receiving stolen property.

1. Appellant testified during the course of his revocation hearing that he was unemployed and could not pay any portion of the $550.00 balance of the fine and restitution. "This testimony provided an adequate basis for the trial court's order revoking appellant's probation. 'Only slight evidence is required to authorize revocation, (cit.) and where there is even slight evidence of misconduct, the appellate court will not interfere with revocation unless there has been manifest abuse of

discretion. (Cits.)' Boston v. State, 128 Ga. App. 576 (197 SE2d 504)(1973). Thus, even assuming that the record supported appellant's contention that the trial court based its revocation order in part upon his [failure to regularly report to his probation officer], no notice of which ground was provided to him prior to the revocation hearing, the order of the trial court revoking his probation will nevertheless be upheld because it rests alternatively upon the independent determination by the court that appellant violated yet another of the conditions of his probation." Simmons v. State, 156 Ga. App. 336, 337 (274 SE2d 726)(1980); see also Simpson v. State,154 Ga. App. 775 (2) (270 SE2d 50)(1980), vacated on other grounds, Simpson v. Georgia, 450 U.S. 972 (101 SC 1504, 67 LE2d 808)(1981). Compare Radcliff v. State, 134 Ga. App. 244 (214 SE2d 179)(1975).

2. Appellant contends that because he was indigent the revocation of his probation for failure to pay the required fine and restitution violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. This contention has been decided adversely to appellant in Hunter v. Dean, 240 Ga. 214 (239 SE2d

791)(1977); Calhoun v. Couch, 232 Ga. 467 (207 SE2d 455)(1974); but see Wood v. Georgia, 450 U.S. 261, 284-287 (101 SC 1097, 67 LE2d 220)(1981) (White, J., dissenting). We see no basis for distinguishing this case, where appellant was placed on probation as a first offender pursuant to Code Ann. § 27-2727, from the foregoing cases, where the appellants were apparently not entitled to first offender status and were placed on probation pursuant to Code Ann. § 27-2709. Code Ann. § 27-2727 provides that upon violation of the terms of probation, the trial court is authorized to enter an adjudication of guilt and "proceed as otherwise provided" under the Statewide Probation Act, Code Ann. § 27-2702 et seq. No matter under which provision of the Act probation is given, a criminal defendant is subject to revocation of his probation if he is found to have violated the conditions thereof.

Judgment affirmed. Quillian, C. J., and McMurray, P. J., concur.

Court of Appeals
of the State of Georgia

ATLANTA, March 15, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

62930 Danny R. Bearden v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied. (Original opinion dated February 24, 1982)

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA MAR 15 1982

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

Alton Hawk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta APR 8 1982

Case No. 38642. Bearden v. The State

The Supreme Court today denied the writ of certiorari in this case.
All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

CERTIFICATE OF SERVICE 81-6133

I, JAMES H. LOHR, hereby certify that a true and exact copy of the foregoing Brief for Petitioner was served upon Counsel for the Respondent by depositing the document in a United States Post Office or mailbox, with first-class postage prepaid, addressed to George H. Weaver, 132 State Judicial Building, 40 Capitol Square, S.W. Atlanta, Georgia 30334.

This the 3rd day of August, 1982.

Jim Lohr
JAMES H. LOHR

RECEIVED
AUG 6 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF FILING UNDER RULE 28 81-6633

I, JAMES H. LOHR, hereby certify and swear that I personally deposited in a United States Post Office or mailbox on July 7, 1982, with first-class postage prepaid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the foregoing Brief for Petitioner.

Jim Lohr
JAMES H. LOHR

Sworn to and subscribed before me this the 3rd day of August, 1982.

Anne Slack
Notary Public

My Commission Expires: 12/4/84

RECEIVED
AUG 6 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 81 6633

RECEIVED
MAY 3 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DANNY R. BEARDEN,

Petitioner

vs.

STATE OF GEORGIA

Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Danny R. Bearden respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the rules of this Court. The affidavit of Danny R. Bearden in support of this motion is hereto attached.

Filed herewith is a petition for writ of certiorari of the moving party.

This the 29th day of April, 1982.

Respectfully submitted,

HATFIELD, McCOLPIN,
VAN CLEAVE & STUICE

BY: Jim Lohr

James H. Lohr
Attorney for Petitioner
428 McCallie Avenue
Chattanooga, Tennessee 37402

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 81 6633

DANNY R. BEARDEN

Petitioner

vs.

STATE OF GEORGIA

Respondent

RECEIVED
MAY 3 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, DANNY R. BEARDEN, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on a writ of certiorari without being required to prepay fees, costs, or give security thereof, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of this proceeding are true.

1. Are you presently employed?

   Answer: No.

   a. Not Applicable

   b. My last employment ended in November of 1980. I received approximately $ 760.00 per month when I was last employed.

2. Have you received within the past twelve months any income from a business, profession or other form or self-employment, or in the form of rent payments, interest, dividends, or other source?

   Answer: No.

   a. Not applicable

3. Do you own any cash, checking or savings accounts:

Answer: No.

a Not applicable

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

a. Not applicable

5. List the persons who are dependent upon you for support and state your relationship to those persons.

1. Jean Bearden - wife
2. Rachael Bearden - child, age
3. Christopher Bearden - stepchild, age

The petition states that he is incarcerated in the County jail at Catoosa County, and that although he is responsbile for the support of his family he has been unable to provide any support while he has been incarcerated.

The petitioner further states that because of his indigency James H. Lohr was appointed to represent petitioner in the Superior Court of Catoosa County, Georgia, (see Appendix to Petition for Writ of Certiorari, page 1), and that the James H. Lohr has represented petitioner in prior appeals in this case before the Georgia Appellate Courts.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

This the 21st day of April, 1982.

Danny R Bearden
DANNY R. BEARDEN

STATE OF Georgia
COUNTY OF Catoosa

Personally appeared before me, the undersigned authority, DANNY R. BEARDEN, the person known to me who made oath that he executed the foregoing instrument, and acknowledged that he executed the same as his own free act and deed for the purposes contained therein.

WITNESS my hand and Notarial Seal.

Notary Public

My Commission Expires:_____

JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-6633

In the Supreme Court of the United States

OCTOBER TERM, 1982

DANNY R. BEARDEN, PETITIONER,

v.

STATE OF GEORGIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

JOINT APPENDIX

JAMES H. LOHR
428 McCallie Avenue
Chattanooga, TN 37402
(615) 756-5880
Counsel for Petitioner

GEORGE M. WEAVER
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344
Counsel for Respondent

PETITION FOR CERTIORARI FILED MAY 3, 1982
CERTIORARI GRANTED JUNE 28, 1982

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No. 8917

SUPERIOR COURT

Catoosa County

September Term, 1980

THE STATE

-VS.-

DANNY BEARDEN

FELONY
INDICTMENT
for
BURGLARY

True BILL

Nora Robbs, *Foreman*

11th day of September, 1980

CATOOSA COUNTY, GA

FILED IN OFFICE

Sept 11 WILLIAM (BILL) CAMPBELL *District Attorney*

NORMAN L. STONE, *Clerk*

The Defendant Danny Bearden waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of Jurors and pleads guilty.

DANNY BEARDEN, *Defendant*

W. M. PHILLIPS, *Defendant's Attorney*

WILLIAM M. (BILL) CAMPBELL, *District Attorney*

A. B. BROOKS, *J. P.*

WITNESSES:

In addition to any persons named in the body of this instrument.

KEN HALE *Prosecutor*
C.C.S.O.

MARTHA KUNGERGER
Lot 8, Rt. 8
Hickory Grove Trlr. Park
Ringgold, GA

DONNA M. STEVENS
301 A, Inman St.
Ringgold, GA

NORMAN HANSEN
c/o Days Inn Motel
GA Hwys. 146 & I-75
Ringgold, GA

MRS. DANNY BEARDEN

GEORGE BROWN
C.C.S.O.

J. D. STEWART
HAROLD BRADFORD
A. B. BROOKS
C.C.S.O.

INDICTMENT

GEORGIA, CATOOSA COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY
THE GRAND JURORS SELECTED, CHOSEN AND SWORN FOR SAID COUNTY, TO-WIT:

1 NORA ROBBS *Foreman*	9 WILLIAM N. CHASE
2 MARTHA WATTS	10 EDITH B. LAND
3 STEVE LEMANS	11 KENNETH E. PARTON
4 DONALD L. ARMOUR	12 MARGARET HINSON
5 MALCOLM L. THOMPSON	13 BARBARA CANALES
6 WAYNE M. TEMPLETON	14 HERMAN N. WARTHER
7 SANDRA THOMAS	15 CHARLES E. THOMPSON
8 ALMA C. CALLAHAN	16 STEVE E. CHOATE

In the name and behalf of the citizens of Georgia, charge and accuse Danny Bearden with the offense of FELONY, for that the said Danny Bearden did on the 7th day of July in the year of our Lord Nineteen Hundred and Eighty in the County aforesaid, did unlawfully and without authority and with intent to commit a theft therein, enter the mobile home dwelling house of Martha Kungerger, the lawful occupant thereof, said mobile dwelling house being then and there located at Lot 8, Route 8, Hickory Grove Trailer Park, Ringgold, Catoosa County, Georgia, contrary to the laws of said State, the good order, peace and dignity thereof.

WILLIAM M. (BILL) CAMPBELL
District Attorney

IN THE SUPERIOR COURT FOR THE COUNTY OF CATOOSA
STATE OF GEORGIA

THE STATE OF GEORGIA

VS

DANNY BEARDEN

Case No. 8917
September Term, 1980
Offense: Burglary

ORDER OF COURT UNDER FIRST OFFENDER'S ACT

Filed October 8, 1980

The Defendant, Danny Bearden, having entered his plea of guilty in the above case and the Court, prior to an adjudication of guilt, finds that the Defendant has not been previously convicted of a felony, and the Court without entering a judgment of guilt against the Defendant, and with the consent of the Defendant, does hereby defer further proceedings in this case and places the Defendant on Probation as provided by the Statewide Probation Act (Sections 27-2702 through 27-2726.1), for a period of Three (3) years, upon payment of a fine of $500.00, and restitution in the amount of $50.00. Defendant shall pay $100.00 of said fine instanter and $100.00 of said fine on or before October 9, 1980. The remaining $350.00 of said fine and restitution shall be paid within Four (4) months of October 8, 1980. Upon violation of the terms of probation, or upon a conviction for another crime, the Court may enter an adjudication of guilt and proceed as provided by law.

Provided, however, that the said Defendant, during the term of this probation sentence shall report to the Probation Officer of this Lookout Mountain Judicial Circuit as may be directed by the Court or said Probation Officer, not to leave the jurisdiction of this Court without the permission of this Court, and shall drink no alcoholic beverages nor use any narcotics nor possess same and shall keep no

company with persons of bad reputation, avoid places of disreputable character, and visit no places where alcoholic beverages or drinks or narcotics are sold, and shall permit the Probation Officer to visit him (her) at home or elsewhere at any time, and shall work faithfully at suitable employment insofar as possible, and shall violate no penal laws of this State or any State of the federal government, or municipal ordinance as are herein specified, and as may from time to time be required by the Court or Probation Officer.

This Order is imposed pursuant to the provisions of Sections 27-2727 and 27-2728 of the Code of Georgia, Annotated.

FURTHER ORDERED that a copy of this Order be forwarded to the Office of the State Probation System and the Identification Section of the Federal Bureau of Investigation.

ENTERED, this 8th day of October, 1980.

/s/ _____
ROBERT E. COKER
Judge of the Superior Court
Lookout Mountain Judicial Circuit

We Hereby Consent to the Within Order.

/s/ _____
DANNY BEARDEN
Defendant

/s/ _____
WILLIAM M. PHILLIPS
Attorney for
Defendant

No. 8923

SUPERIOR COURT

Catoosa County

September Term, 1980

THE STATE

-VS.-

DANNY BEARDEN

FELONY
INDICTMENT
for
THEFT BY RECEIVING STOLEN PROPERTY

True BILL

NORA ROBBS *Foreman*

11th day of September, 1980

Catoosa County, GA.

Filed in Office

9/11 WILLIAM M. (BILL) CAMPBELL *District Attorney*

NORMAN L. STONE *Clerk*

The Defendant Danny Bearden waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of Jurors and pleads guilty.

DANNY BEARDEN *Defendant*

W. M. PHILLIPS *Defendant's Attorney*

WILLIAM M. (BILL) CAMPBELL, *District Attorney*

A. B. BROOKS *J.P.*

WITNESSES:

In addition to any persons named in the body of this instrument

KEN HALE *Prosecutor*
C.C.S.O.

STEVE PAUKERT, *Mngr.*
c/o Rodeway Inn
133 W. Burnside
Pocatello, Idaho 83201
(208) 237-0020

MARK SAUNDERS

JOSEPH LYNN ELLIS
32 Timber Ridge Trail
Ringgold, GA

DOUG JONES
c/o Days Inn Motel
GA Hwys. 146 & I-75
Ringgold, GA
891-9910

MIKE GARD
C.C.S.O.

INDICTMENT

GEORGIA, CATOOSA COUNTY.

**IN THE SUPERIOR COURT OF SAID COUNTY
THE GRAND JURORS SELECTED, CHOSEN AND SWORN
FOR SAID COUNTY, TO-WIT:**

1 NORA ROBLES *Foreman*	12 EDITH B. LAND
2 MARTHA WATTS	13 KENNETH E. PARTON
3 NEAL PINDLY	14 MICHAEL ZEIGLER
4 STEVE LEMANS	15 DONALD L. ARMOUR
5 ALMA C. CALLAHAN	16 BRENDA C. MCMILLEN
6 MALCOLM L. THOMPSON	17 PAMELA J. GRIFFIN
7 WAYNE M. TEMPLETON	18 SHEILA E. EDWARDS
8 SANDRA THOMAS	19 OPAL DENISE AHERN
9 BARBARA CANALES	20 CHARLIE E. THOMPSON
10 MARGARET HINSON	21 STEVE E. CHOATE
11 WILLIAM N. CHASE	22 HERMAN L. WARTHER

In the name and behalf of the citizens of Georgia, charge and accuse Danny Bearden with the offense of FELONY, for that the said Danny Bearden did on the 11th day of July in the year of our Lord Nineteen Hundred and Eighty in the County aforesaid, did unlawfully receive and retain stolen property, to wit: one (1) RCA VCR video recorder, model VBT 200, serial number 7384HM128, the property of Steve Paukert, with a value of $1,000.00, knowing said property was stolen, said property not having been received and retained with intent to restore it to the owner, contrary to the laws of said State, the good order, peace and dignity thereof.

WILLIAM M. (BILL) CAMPBELL
District Attorney

IN THE SUPERIOR COURT FOR THE COUNTY OF CATOOSA
STATE OF GEORGIA

THE STATE OF GEORGIA

VS

DANNY BEARDEN

CASE NO. 8923

SEPTEMBER TERM, 1980

OFFENSE: THEFT BY RECEIVING

ORDER OF COURT UNDER FIRST OFFENDER'S ACT

FILED OCTOBER 8, 1980

The Defendant, Danny Bearden, having entered his plea of guilty in the above case and the Court, prior to an adjudication of guilt, finds that the Defendant has not been previously convicted of a felony, and the Court without entering a judgment of guilt against the Defendant, and with the consent of the Defendant, does hereby defer further proceedings in this case and places the Defendant on Probation as provided by the Statewide Probation Act (Sections 27–2702 through 27–2726.1), for a period of One (1) year upon payment of restitution in the amount of $200.00, said $200.00 restitution shall be paid within Four (4) months of October 8, 1980. Upon violation of the terms of probation, or upon a conviction for another crime, the Court may enter an adjudication of guilt and proceed as provided by law.

Provided, however, that the said Defendant, during the term of this probation sentence shall report to the Probation Officer of this Lookout Mountain Judicial Circuit as may be directed by the Court or said Probation Officer, not to leave the jurisdiction of this Court without the permission of this Court, and shall drink no alcoholic beverages nor use any narcotics nor possess same and shall keep no company with persons of bad reputation, avoid places of disreputable character, and visit no places where alcoholic beverages or drinks or narcotics are sold, and shall permit

the Probation Officer to visit him (her) at home or elsewhere at any time, and shall work faithfully at suitable employment insofar as possible, and shall violate no penal laws of this State or any State of the federal government, or municipal ordinance and be of general good behavior, and shall observe such other conditions as are herein specified, and as may from time to time be required by the Court or Probation Officer.

This Order is imposed pursuant to the provisions of Sections 27–2727 and 27–2728 of the Code of Georgia, Annotated.

FURTHER ORDERED that a copy of this Order by forwarded to the Office of the State Probation System and the Identification Section of the Federal Bureau of Investigation.

ENTERED, this 8th day of October, 1980.

/s/ _____

ROBERT E. COKER
Judge of the Superior Court
Lookout Mountain Judicial Circuit

WE HEREBY CONSENT TO THE WITHIN ORDER.

/s/ _____

DANNY BEARDEN
Defendant

/s/ _____

WILLIAM M. PHILLIPS
Attorney for Defendant

PETITION FOR REVOCATION OF PROBATION
DEPARTMENT OF CORRECTIONS/OFFENDER REHABILITATION

800 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30308

THE STATE

VS

DANNY RAY BEARDEN

No. 8923; 8917, September Term

1980, Superior Court

Of Catoosa County

Now comes D. L. Lomenick, District Attorney, in the name and behalf of the State of Georgia, and brings this action against Danny Ray Bearden, hereinafter called the Defendant, and shows:

I

That the Defendant entered a plea of guilty to the offense of Burglary and Theft by Receiving at the September Term, 1980.

II

That this Court, on the 8th day of October, 1980, did sentence the Defendant to serve as follows: Three years probation; one year concurrent; $500.00 fine and $250.00 restitution ($200.00 instanter and balance $550.00 on or before February 8, 1981).

III

That this Court, by proper order, however, permitted the Defendant to serve said sentence on probation, the terms and conditions of which are fully set forth in the copy of said sentence which is attached hereto, marked as Exhibit "A", and specifically incorporated herein.

IV

That the Defendant has violated the following terms and conditions of probation in the following particulars: Did unlawfully and without authority on the 10th day of May, 1981, enter the home of Lucy Haney, 103 Garden Road, in Ringgold, Catoosa County, Georgia, for the purpose of commiting a theft. Defendant has also failed and refused to pay fine and restitution balance of $550.00, which was to be paid on or before February 2, 1981.

V

WHEREFORE, the State of Georgia prays that the citation for revocation of probation be served on the Defendant and that the Defendant be directed to appear before this Court on a day to be fixed by the Court and at that time to show cause why probation should not be revoked.

This 27th day of April, 1981.

RALPH L. VAN PELS, JR.
Assistant District Attorney, Lookout Mountain Judicial Circuit

CATOOSA COUNTY, GA. FILED IN OFFICE
May 29, 1981
JANICE BENTON
Deputy Clerk

Order

Having read and considered the foregoing petition, it is hereby ordered that the Defendant be served with a copy of same and that the Defendant show cause before me on the 3rd day of June, 1981, at the Courthouse in Ringgold Georgia, at 1:00 P.M. why said probation should not be revoked.

This 29th day of May, 1981.

Filed in office
May 29, 1981
/s/ JANICE BENTON,
Deputy Clerk

GEORGE D. ANDRE
Judge, Lookout Mountain Judicial Circuit

CERTIFICATE OF SERVICE
(Omitted in Printing)

IN THE SUPERIOR COURT OF CATOOSA COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

VS.

DANNY BEARDEN

INDICTMENT NUMBERS:
8917, 8923
Burglary, Theft by Receiving

ORDER

Filed June 25, 1981

The above case having come on to be heard by this Court on the State's Petition for Revocation of Probation of March 3, 1981, and after hearing evidence and the arguments of counsel, and after considering and assessing the credibility of each and all of the witnesses who testified, this Court finds as follows:

1.

This Court hereby finds as a matter of fact, from a preponderance of the evidence produced at the above hearing, as follows:

A.

That on October 8, 1980, the defendant entered pleas of guilty under the First Offender's Act to each of the above felony indictments alleging burglary and theft by receiving.

B

That the defendant was represented by counsel at the time said pleas were entered and that the pleas were knowingly and voluntarily entered.

C

That based on those pleas, the Court sentenced the defendant to serve a term of three (3) years under the First

Offender's Act as to Indictment Number 8917, conditioned upon payment of a $500.00 fine, and $50.00 restitution, to be paid within four (4) months of the date of sentencing. Defendant was further sentenced to serve a term of one (1) year under the First Offender's Act as to Indictment Number 8923, conditioned upon payment of $200.00 restitution, also to be paid within four (4) months of the date the sentence was imposed.

D.

That as of the date of the above hearing on June 3, 1981, the defendant had paid only $200.00 toward the $750.00 total of fines and restitution which he had been ordered to pay by February 8, 1981, as a condition of his probation.

E

That the defendant had also failed to report to his probation officer as directed.

2.

This Court further finds as a matter of law that the failure to pay fines and restitution ordered and failure to report constituted a violation of the express terms and conditions of the defendant's sentence of probation under the First Offender's Act entered on October 8, 1980.

3.

It is therefore ORDERED that the defendant's sentence of probation under the First Offender's Act be revoked and the defendant is remanded to the custody of the Director of the Department of Offender Rehabilitation for execution of the sentence entered pursuant to the First Offender's Act.

This 11th day of June, 1981.

JOSEPH E. LOGGINS
Judge, Superior Court
Lookout Mountain Judicial Circuit

SENTENCE

THE STATE

VS.

DANNY BEARDEN

No. 8917

Catoosa Superior Court

DETERMINATE SENTENCE

Term Five (5) Years

Offense Burglary

Plea: Not Guilty First Offender/Revocation Guilty

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT:

That the Defendant serve the full term of 5 (years) in the Penitentiary or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. Said Sentence to run CONCURRENTLY—CONSECUTIVELY to ____.

This 3d day of June, 1981.

District Attorney
DAVID L. LOMENICK, JR.

JOSEPH E. LOGGINS
Judge, Superior Court,
Lookout Mountain Judicial Circuit

SENTENCE

THE STATE

VS.

DANNY BEARDEN

No. 8923

Catoosa Superior Court

DETERMINATE SENTENCE

Term Three (3) Years
Offense Theft by Receiving

Plea: Not Guilty First Offender/Revocation Guilty

WHEREUPON, IT IS ORDERED AND ADJUDGED BY THE COURT:

That the Defendent serve the full term of 3 (years) in the Penitentiary or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. Said sentence to run CONCURRENTLY to #8917 (Burglary).

This 3d day of June, 1981.
District Attorney
WM. M. CAMPBELL

JOSEPH E. LOGGINS
Judge, Superior Court,
Lookout Mountain Judicial Circuit

IN THE SUPERIOR COURT OF CATOOSA COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, PLAINTIFF

VS

DANNY BEARDEN, DEFENDANT

Criminal Action

NOS: 8917 and 8923

ORDER

September 17, 1981

The Defendant's Motion to Modify Sentence in the above cases having come to be heard by this Court on the 9th day of September, 1981, and it appearing upon a hearing of said motion that the record of these cases does not show that the Defendant was properly instructed as to the possible results of the revocation of his probation at the time the Defendant entered his pleas of guilty under the First Offenders Act on October 8, 1980.

IT IS THEREFORE ORDERED that the Defendant's sentences as entered by this Court on the 3rd day of June, 1981, are hereby modified and amended as follows: The Defendant shall serve the remaining time of his probation as specified in the Court orders entered in the above cases and dated the 8th day of October, 1980, in the penitentiary or such other institutions the Director of the State Board of Corrections may direct, to be computed as provided by law.

This the 17th day of September, 1981.

JOSEPH E. LOGGINS
Judge, Superior Court
Lookout Mountain Judicial Circuit

IN THE COURT OF APPEALS OF GEORGIA

OPINION

FEB 24, 1982
62930.

BEARDEN

VS

THE STATE

P–209

POPE, JUDGE.

Danny Ray Bearden appeals the revocation of his probation. He enumerates as error the revocation of his probation on a ground not asserted in the petition to revoke his probation. He also enumerates a violation of the Constitution in the trial court's revocation of his probation on the ground that he had failed to pay the fine and restitution assessed.

On October 8, 1980 appellant pled guilty to the offenses of theft by receiving stolen property and burglary. He was placed on probation as a first offender pursuant to Code Ann. § 27–2727. For the offense of theft by receiving stolen property, he was required to serve one year on probation upon payment of $200.00 restitution, said restitution to be paid within four months of October 8, 1980. For the offense of burglary he was required to serve three years on probation upon payment of a fine of $500.00 and restitution in the amount of $50.00; appellant was required to pay $200.00 of the fine almost immediately and $350.00 comprising fine and restitution within four months of October 8, 1980. The state moved on May 27, 1981 to revoke appellant's probation on the grounds that he had committed a burglary on May 10, 1981 and also that he had failed to pay the $550.00 balance of the foregoing fine and restitution. Following a hearing on the petition on June 3, 1981, the trial court found that appellant had not paid the required fine and restitution and also found that appellant had failed to report to

his probation officer as directed." The trial court revoked appellant's probation and sentenced him to concurrently serve five years for the offense of burglary and three years for the offense of theft by receiving stolen property.

1. Appellant testified during the course of his revocation hearing that he was unemployed and could not pay any portion of the $550.00 balance of the fine and restitution. "This testimony provided an adequate basis for the trial court's order revoking appellant's probation. 'Only slight evidence is required to authorize revocation, (cit.) and where there is even slight evidence of misconduct, the appellate court will not interfere with revocation unless there has been manifest abuse of discretion. (Cits.)' *Boston v. State*, 128 Ga. App. 576 (197 SE2d 504) (1973). Thus, even assuming that the record supported appellant's contention that the trial court based its revocation order in part upon his [failure to regularly report to his probation officer], no notice of which ground was provided to him prior to the revocation hearing, the order of the trial court revoking his probation will nevertheless be upheld because it rests alternatively upon the independent determination by the court that appellant violated yet another of the conditions of his probation." *Simmons v. State*, 156 Ga. App. 336, 337 (274 SE2d 726) (1980); see also *Simpson v. State*, 154 Ga. App. 775 (2) (270 SE2d 50) (1980), vacated on other grounds, Simpson v. Georgia, 450 U.S. 972 (101 SC 1504, 67 LE2d 808) (1981). Compare *Radcliff v. State*, 134 Ga. App. 244 (214 SE2d 179) (1975).

2. Appellant contends that because he was indigent the revocation of his probation for failure to pay the required fine and restitution violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. This contention has been decided adversely to appellant in *Hunter v. Dean*, 240 Ga. 214 (239 SE2d 791) (1977); *Calhoun v. Couch*, 232 Ga. 467 (207 SE2d 455) (1974); but see Wood v. Georgia, 450 U.S. 261, 284–287 (101 SC 1097, 67 LE2d 220) (1981) (White, J., dissenting). We see no basis for distinguishing this case, where appellant was placed on probation as a first offender pursuant to Code Ann. § 27–2727, from the foregoing cases, where the appellants

were apparently not entitled to first offender status and were placed on probation pursuant to Code Ann. § 27–2709. Code Ann. § 27–2727 provides that upon violation of the terms of probation, the trial court is authorized to enter an adjudication of guilt and "proceed as otherwise provided" under the Statewide Probation Act, Code Ann. § 27–2702 et seq. No matter under which provision of the Act probation is given, a criminal defendant is subject to revocation of his probation if he is found to have violated the conditions thereof.

Judgment affirmed. Quillian, C. J., and McMurray, P. J., concur.

[1] **IN THE SUPERIOR COURT OF CATOOSA COUNTY, GEORGIA**
AT RINGGOLD

STATE OF GEORGIA, PLAINTIFF,

-VS-

DANNY BEARDEN, DEFENDANT.

CRIMINAL ACTION
NOS. 8917 & 8923

APPEARANCES:

FOR THE STATE OF GEORGIA:
RALPH VAN PELT, *Esq.*,
Assistant District Attorney.

FOR THE DEFENDANT:
JAMES H. LOHR, *Esq., of*
Hatfield, McColpin, Morgan,
Van Cleave & Stulce, Esqrs.,
416 Battlefield Parkway,
Fort Oglethorpe, Georgia 30741

June 3, 1981

TRANSCRIPT OF PROCEEDINGS

[2] BE IT REMEMBERED, the above-entitled cause came on for hearing on the 3rd day of June, 1981, before the Honorable Joseph E. Loggins, Judge of the Superior Courts, Lookout Mountain Judicial Circuit, when the following proceedings were had, and evidence introduced, to-wit:

MR. VAN PELT: This is a probation revocation, State versus Danny Bearden, in reference to No. 8917, felony indictment for burglary, 8923, a felony indictment for theft by receiving stolen property.

Mr. Bearden is being represented by Mr. Lohr in this case, Your Honor.

THE COURT: All right.

MR. LOHR: Your honor, one preliminary matter, here. I talked with Mr. Van Pelt, and we're willing to stipulate

that there has been fingerprints taken, and that there is alleged here that Mr. Bearden burglarized a trailer over on Garden Road in Ringgold. That's the basis, one of the basis for the revocation.

The results from these fingerprint analysis has not come back from the lab, and I would like to request this Court—move this Court to continue this hearing until such time as we may get the report on the fingerprint analysis.

I have reason to believe that it may be [3] exculpatory in this matter.

THE COURT: When were the fingerprints sent to the Crime Laboratory?

MR. VAN PELT: It's been—do you remember what day it was Ken took those down there, Chief? It's been a couple of three weeks, Your Honor.

What was sent were copies of Mr. Bearden's prints and some items from the trailer that were sent. That may or may not be dispositive.

It's entirely possible that they wouldn't be able to lift a latent print from any of the items that were sent. We have some—

THE COURT: (Interposing) Are you relying upon the results of the test as to that alleged crime?

MR. VAN PELT: No, sir, not at this hearing. We're not relying on them for the basis of the revocation, no, sir.

MR. LOHR: Your Honor, I think it's pretty well established the identity of three individuals that were in that trailer. The fourth individual, I think, the dispute is over. The dispute is over who the fourth individual was in that trailer.

It would be conflicting testimony on that matter.

The reason I'm interested in those prints is to find out if in fact there are prints from the fourth [4] person, not the three that I believe will be established as being in that trailer, and whether or not the prints from those—that fourth person would be Danny Bearden or some other individual. But, at this point—

THE COURT: (Interposing) But, supposing, Mr. Lohr, it comes back that there were 15 other people in that trailer, none of whom were the defendant in the case.

Are you saying that that would be the defense in the case, that this defendant didn't enter the trailer?

MR. LOHR: Yes, yes, that is the defense, Your Honor.

THE COURT: You're saying, if the defendant did in fact enter the trailer, then his fingerprints would be in the trailer on these items that were dusted, and the fingerprints taken?

MR. LOHR: I'm not saying that if he was in the trailer not necessarily will his fingerprints show. I agree to that point. The point is there may be prints of a fourth individual, I believe it will be established probably that there were four individuals in that trailer, three individuals I think the identity will not be in dispute, the fourth individual—Mr. Bearden is accused of being that fourth individual.

[5] The defense, I believe, he was not in the trailer, and if in fact there are prints from another individual, not these three, and not Mr. Bearden, I believe that establishes, tends to establish that Mr. Bearden was, in fact, not in the trailer.

I would just like to see the results of this test before we go on with this hearing. That's basically—

MR. VAN PELT: (Interposing) Your Honor, we have a second ground alleged in addition to the burglary.

THE COURT: I understand that, but let's stay on the fingerprint subject for the time being.

I may be wrong, but I've known a lot of cases where the defendant did in fact enter the building, but his fingerprints couldn't be found in that building.

Now, Mr. Lohr, as to these other three defendants, you say there's no question as to the identity of those three? Is that based upon fingerprints?

MR. LOHR: Well, to my knowledge, not at this point.

I believe, this is just based upon my investigation up to this point, what I believe to be. I think that's important evidence, the fingerprints.

THE COURT: I think it's important evidence if in fact they have fingerprints.

What you're—what seems to me that your [6] argument is the negative, and that is that if there are no fingerprints found inside the trailer, then the defendant wasn't in

that trailer, and your theory is, that if, if the defendant entered the trailer, then his fingerprints would have been found, and the Crime Lab report would show that it was his fingerprints; is that right?

MR. LOHR: No. I can—my theory is that there were four people in the trailer, Mr. Bearden was not one of them.

I wouldn't be surprised if the Crime Lab showed prints from four individuals, and that Mr. Bearden's prints will not be among those.

You see, it's the fact that there were four individuals, that there are four different sets of prints that show up, and none of those are Mr. Bearden's, and I think if that were established, that would be exculpatory in this matter.

THE COURT: I think it would be exculpatory and it could be used, but unless the State is relying on, as a part of their case here, on the fingerprints to go forward with this case, then I don't see how a continuance is necessary in this case.

MR. LOHR: It's just evidence that we don't have at this time, Your Honor. We're not able to obtain [7] at this time, which we would be able to obtain upon request once the State receives the results from this lab test.

I would very much like to have that evidence available before we go ahead with this, at least this portion of the hearing.

THE COURT: If Mr. Van Pelt has stated that he is not relying on that evidence at all in this hearing, then how would it be material to this hearing if there's no evidence submitted on that point?

MR. LOHR: We have a defense to put on. It could very well be that we would want to use that evidence in the defense.

THE COURT: As to this hearing?

MR. LOHR: As to this hearing.

THE COURT: If Mr. Van Pelt is not going to use it, how can you use it as a defense?

MR. LOHR: Can't I subpoena the individuals from the Crime Lab?

THE COURT: You can anybody you want to.

MR. LOHR: I mean, that would be, that would be what I intend to do if in fact it was favorable for the defendant.

THE COURT: In any event, the Court is going to deny your request for a continuance.

[8] Now, at such time as the State attempts in any way to use this alleged burglary for which the fingerprints would be important to you, then the Court will take it under consideration again, and might change the ruling.

MR. LOHR: With respect to this particular hearing? I understand, if I understand you correctly, that if the State relies on the basis of the burglary for the revocation, that at that time the Court will—

THE COURT: (Interposing) I will reconsider it, yes, sir.

MR. LOHR: Okay. Thank you.

MR. VAN PELT: Very well. We'll, Your Honor, in that case, we'll confine ourselves to the second ground of the revocation.

THE COURT: All right.

MR. VAN PELT: Okay. First, Your Honor, I would like to submit—the first piece of evidence I would like to submit, S-1. It's already marked as S-1.

THE COURT: Have you shown it to defense counsel?

MR. VAN PELT: Yes, Your Honor, that's a certified copy of plea and sentence in both cases, and I believe the, the Clerk's copy of the petition shows the defendant was served with a copy of those along with a copy of the petition.

[9] MR. LOHR: No objection.

THE COURT: All right. Let State's Exhibit 1 be admitted.

(Whereupon, the document referred to above as State's Exhibit No. 1 was received into evidence.)

MR. VAN PELT: Your Honor, I would like to call to the Court's attention that both of these are first offender sentences in both cases.

THE COURT: All right. Proceed.

MR. VAN PELT: State would call Mr. Mullis. Would you raise your right hand. Do you swear that the testimony you are about to give in this case before the Court is the truth, the whole truth and nothing but the truth, so help you God?

JACK MULLIS,

called as a witness at the instance of the State of Georgia, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VAN PELT:

Q For the record, would you state your full name and how you are employed?

A I'm Jack Mullis, and I'm the Probation Officer for the Lookout Mountain Judicial Circuit.

Q And then, what are your duties with the Probation [10] Office?

A Duties for the Probation Office is to supervise and collect fines and restitutions that a person is ordered to pay through our office.

Q Do you supervise and collect fines?

A Yes, sir.

Q And supervise the collection of fines in Catoosa County?

A Yes, sir.

Q And in particular, do you supervise Danny Bearden?

A Danny Bearden is on my case load, yes.

Q And pursuant to a sentence of the Court in this case, do you have any knowledge as to whether or not Mr. Bearden was ordered to pay a fine?

A Yes. He was ordered to pay a fine.

Q Do you know how much the amount of that fine was in each of the cases?

A He paid, it was $500 fine, and $200—$250 restitution, and he was ordered by the Court to pay a $200 instanter, which he did, and that's all he's paid, and he was to have this paid by February the 8th, 1981.

Q Okay. So, to your knowledge, and as far as you know, what the records of the Clerk of the Court reflect is that—

A (Interposing) He has not paid that.

Q (Continuing)—he has not paid. He has paid $200?

[11] A Yes.

Q But, has not paid anything above and beyond that?

A No.

Q Have you ever had any contact with Mr. Bearden regarding his—

A (Interposing) I'm sure that he has written letters, because we get out letters every so often about the fine and restitution and stuff like that.

Q Has he contacted you in any effort to explain why he has not been able to pay the fine?

A I don't know of any time that he has.

Q To your knowledge?

A To my knowledge.

Q To your knowledge. Do you have any knowledge of whether or not he's contacted anyone in your office?

A No, I don't. All I know is, what I can tell is that anyone that is ordered by the Judge to pay a restitution and a fine by a certain date, after that date we're—we can issue a warrant after that date because they have been given plenty of ample time to pay that.

Q Okay. What time is reflected on the documents there in front of you? When was Mr. Bearden to have completed paying his fine by?

A He was to have completed that by February the 8th, 1981.

[12] Q And today's date is June the 3rd?

A This is June, so he's had plenty of time to pay it. Whether we—whether we get in touch with them or write them or anything else about their fine, they know that, it is explained to them when they're put on probation when the fine is due, and that's when it's to be paid, on or before that time, and we usually give them a little extra time to, you know, pay it on time.

Q Do you know if Mr. Bearden was aware that you were his probation officer?

A Yes. When he's written up and put on probation, they are explained, these rules, by the probation officer.

Q Okay.

MR. VAN PELT: No further questions.

THE COURT: Mr. Lohr?

CROSS EXAMINATION

BY MR. LOHR:

Q You say that $200 was paid, was paid immediately?

A Yes.

Q Do you know who paid that amount?

A No, I don't. The Clerk's Office gets a receipt for it, and it's attached to the case. The receipt is attached to the case.

Q In fact, wasn't the Court order that Mr. Bearden pay $100 immediately, and $100 on the next day?

[13] A Well, I don't know till I review this thing. It could have been. I have so many. I couldn't tell you exactly. It could have been that way.

Q Sentence was entered on the 8th day of October; is that correct?

A October the 8th, 1980, was when the sentence was. Three years probation, one year concurrent, five hundred dollar fine, $250 restitution, a $200 instanter, and a balance $550 on or before February the 8th.

Now, I don't have a copy of the sentence here, but whatever the sentence reads, that's the way it is.

MR. LOHR: And, Your Honor, for the record, I would like to state that my copy of the sentence on Case No. 8917 states, defendant shall pay $100 of said fine instanter, and $100 of said fine on or before October 9, 1980.

THE COURT: All right. So noted. Proceed.

BY MR. LOHR:

Q You say that your office has sent letters to Mr. Bearden?

A I said it's the usual procedure that we do.

Q Do you know whether or not—

A (Interposing) No, I don't right offhand know whether I sent him a letter or not, but it's our procedure that we do.

[14] Q Do you know whether or not—or, excuse me—have you had any personal contact with Mr. Bearden since October 9?

A Probably. I don't have my case—my book with me, but probably I have, because I usually get in touch with him.

Q In fact, you cannot testify positively that you have notified Mr. Bearden?

A No. I couldn't tell you positively. I do know that he knew that he owed the fine.

Q And to your knowledge, Mr. Bearden has not contacted you or your office during this period?

A To my knowledge. I'm not saying he hasn't. He might have called and the secretary might have talked to him or something.

Q Did you issue a warrant for his arrest for violation of the probation?

A Failure to pay, yes.

Q When was that warrant issued?

A Tenth day of May, 1981. No, nineteen—right offhand, I don't know, I would have to see the warrant. I can't recollect when I issued—I don't have the warrant here.

Q Was the basis for that—

A (Interposing) But, I give him ample time, I always do, and I issued the warrant for failure to pay as directed [15] by the Court.

Now, that was after February the 8th, 1981.

Q And you did issue a warrant on that basis?

A Yes.

MR. LOHR: I have no further questions at this time.

THE COURT: All right. Anything further, Mr. Van Pelt?

REDIRECT EXAMINATION

BY MR. VAN PELT:

Q Okay. Mr. Mullis, the dates Mr. Lohr was talking about there in the sentence, he's talking about October 8th, then October 9th, when the second $100 was paid. That's the very next day?

A Oh, yeah.

Q That was to be paid, and he did pay the second $100?

A Yeah, he paid that. He paid $200.

Q And he's not paid anything since?

A No, nothing since.

Q And to your knowledge, that's what's reflected in the record of the Clerk of the Court?

A Yes.

MR. VAN PELT: No further questions.

THE COURT: All right, sir, you can step down.

MR. LOHR: Just one question, Your Honor.

[16] RECROSS EXAMINATION

BY MR. LOHR:

Q Do you know whether Danny Bearden or some other person paid this $200?

A No, I don't. I don't know who paid it.

THE COURT: All right. Step down.

(Witness excused.)

THE COURT: Anything further from the State?

MR. VAN PELT: No, Your Honor.

THE COURT: Mr. Lohr?

MR. LOHR: Your Honor, at this time I would like to call Mrs. Jean Bearden.

THE COURT: Are there any other witnesses other than the defendant himself? He may or may not testify. Do you have any other witnesses here, Mr. Lohr, to testify?

MR. LOHR: I have some, but the only other witnesses I have would go to the burglary charge which I understand that the State has—

THE COURT: (Interposing) Gentlemen, let me say this, there was no request for the rule of sequestration to be invoked.

MR. VAN PELT: No, sir.

MR. LOHR: Did not request.

THE COURT: I don't plan to make a practice of [17] calling witnesses from the courtroom to testify, but inasmuch as the rule was not asked for and invoked in this hearing, witnesses may appear that have sat here and listened to this testimony.

But, I don't plan to make a practice of permitting witnesses to testify who have sat in the courtroom and heard other testimony. So, just keep that in mind.

Go ahead and take the witness stand.

MR. LOHR: Raise your right hand, please.

THE COURT: I think they do it on television, don't they, just call them out of the audience and say, come on up here and testify, but we're not on TV, I hope.

MR. LOHR: Do you swear this testimony — evidence that you give in this case will be the truth, the whole truth and nothing but the truth?

Please be seated.

JEAN LILLIAN BEARDEN,

called as a witness at the instance of the defendant, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOHR:

Q Would you please state your name for the Court, please?

[18] A Jean Lillian Bearden.

Q And how are you related to the defendant, Danny Bearden?

A I'm his wife.

Q Mrs. Bearden, have you and Mr. Bearden been living together and residing together since October of last year?

A We did up until January.

Q And has your husband, Mr. Bearden, been employed during that period of time?

A No, sir, he couldn't find no job.

Q Do you and Mr. Bearden own any property jointly?

A No, sir.

Q Does Mr. Bearden own any property to your knowledge?

A None as I know of.

Q Has Mr. Bearden been able to make any payment on the fine or restitution other than the $200 which was paid?

A No, sir. He was working at Rockwell International. He got laid off, and he hasn't been able to find a job since then.

Q To your knowledge, has he attempted to find a job?

A Yes. I have took him to look for jobs myself. I took him to Dalton Unemployment Office, and they didn't have

nothing, and he went to look for different jobs. He has been everywhere in Ringgold to find a job, and nobody's hiring.

MR. LOHR: No further questions.

[19] THE COURT: All right. Mr. Van Pelt?

CROSS EXAMINATION

BY MR. VAN PELT:

Q When was he laid off from Rockwell?

A It was in November, I believe.

Q November?

A Uh-huh.

Q Last year?

A Yes, sir.

Q Okay. Now, he was—you all were married in October, 1980?

A No. We've been married since August of '76.

Q August of '76?

A Uh-huh.

Q And you knew about when Mr. Bearden came to court on these charges in October?

A Uh-huh. I was with him then.

Q And you knew he had—part of his sentence there was that he had to pay a fine?

A Yes, sir.

Q And you knew that?

A Yes, sir.

Q And you knew, also knew that he had a certain amount of time to pay it in; isn't that true?

A The only thing that his papers said when we got it was [20] he had to pay $500. It didn't say what date or nothing on it.

Q You never—what papers?

A His probation papers.

Q Probation papers?

A Uh-huh.

Q You're saying didn't have—

A (Interposing) No definite time on it, just said pay $500.

Q Okay. And you're saying that he's attempted to find work since?

A Yes, sir.

Q He was laid off by Rockwell?

A Yes, sir.

Q Did you try and—have you gotten in touch with anybody in the Probation Office to tell them that he was making an effort to get some money up?

A No, sir. He has been down there a couple of times, and he told them then that he hadn't had no job, but he was looking for one.

Q Where is—where has he looked?

A He's looked in Dalton, all over Dalton carpet mills down there. He went to Babb Lumber Company, Salem Carpet, Dixie Yarn, every place in Ringgold he could think of to go to, but he still hasn't found one.

[21] Q Are you all living together now?

A Not since he's been picked up.

Q I mean before he was arrested?

A No.

Q You weren't?

A No.

Q Were you in the process of getting a divorce?

A No, sir. We was in the process of getting back together till they come picked him up again.

Q I see. The amount that Mr. Bearden paid when he was sentenced back in October, do you know where he got that money?

A Yes, sir. He borrowed it from his mother and father.

Q Has he made any attempts to get any more money from—

A (Interposing) They're like us. They don't have the money either. His father is a retired veteran. He's disabled, and his mother, she has to stay home and take care of him.

Q How does Mr. Bearden get around? Do you all have a car?

A They have a truck.

Q Who's they?

A His mother and father.

Q Does he use it?

A Yes, sir.

[22] Q Does he have any other way of getting to work?

A No, sir.

Q When you all were living together, where did you live? With his parents?

A No, with my mother and father.

Q Your mother and father?

A Uh-huh.

Q Okay.

MR. VAN PELT: I don't have anything further, Judge.

THE COURT: Anything further, Mr. Lohr?

MR. LOHR: Not of this witness, Your Honor.

THE COURT: All right. You can step down.

(Witness excused.)

MR. LOHR: Your Honor, at this time, we would call Mr. Bearden.

Will you raise your right hand, please?

Do you swear that the testimony that you give in this case will be the truth, the whole truth and nothing but the truth? Please be seated.

DANNY BEARDEN,

a defendant, called as a witness in his own behalf, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[23] BY MR. LOHR:

Q Will you state your name for the Court?

A Danny Bearden.

Q And Mr. Bearden, referring to the sentence and the order to pay the fine on that first offender, first offender act, how much has been paid toward that?

A Two hundred dollars.

Q And who paid that $200?

A My father and mother.

Q And have you made any payments since that time?

A No, sir.

Q Why not?

A Cause I haven't had a job.

Q And what efforts have you made? Would you just please tell the Court what efforts you've made to try and find a job?

A A lot. I've walked a lot, too, to find one, and then my mother and dad came to Dalton out at Textile Rubber, and—

Q (Interposing) What placed have you applied at?

A Textile Rubber and Con Agra, and over at the high school, I tried over there.

Q Which high school is that?

A One on the main drag there in Dalton at the end of Dalton.

Q And have you applied for any jobs in this area, [24] Ringgold?

A Yes, sir.

Q Where?

A Salem Carpet. They wouldn't even let me in the gate over there, just said they wasn't doing no hiring.

Q Any other places?

A Yes, sir. I went over here at Georgia Unemployment Office, and they didn't have any—they told me to come back in a couple of weeks.

Q And have you received an offer for employment from any of these?

A No, sir.

Q Places that you've applied?

A I've called Textile Rubber every day.

Q And what has been the result of your contact with the Unemployment Office?

A Don't need nobody.

Q Have you been receiving any unemployment checks?

A No, sir.

Q Have you been receiving any income whatsoever?

A No, sir.

Q Where have you been living since—from the time, from October of last year until you were arrested?

A At my mother's.

Q Do you own any property? Automobile?

[25] A No, sir.

Q Land?

A No, sir.

Q Anything of any value?

A No, sir.

Q Mr. Bearden, is there any way that you can pay this fine—that you could have paid this fine in the past?

A No, sir.

Q Have you attempted to contact the Probation Officer or his office with respect to this matter?

A I've called the secretary, and she said that he was out in Trenton.

Q Did you lave a message?

A I told them that I was going to be late, I'm trying to find a job and get a payment up.

Q And what was their response?

A They said we would tell them.

Q Have you received any letters or any other contact from the Probation Office?

A No, sir.

Q Not received any letters?

A No, sir.

Q Have you spoken with Mr. Mullis since the date of your sentence on October 8th, 1980?

A I've been in his office once down there when I was in [26] LaFayette.

Q Excuse me?

A I went in his office in LaFayette down there. It was, I think, a week after that when I got put on probation, I was supposed to went down there and got my papers and everything.

Q Did you receive your papers?

A Yes, sir.

Q Was it explained to you when and how you were to make your payments?

A Well, I can't read, and I can't hardly see. So, my wife read them to me.

MR. LOHR: I have no further questions.

THE COURT: Mr. Van Pelt?

CROSS EXAMINATION

BY MR. VAN PELT:

Q Thank you. Mr. Bearden, back in October, Judge Coker read, pronounced sentence he was imposing on you, didn't he?

A Yes, sir.

Q And he told you that you were going to have to pay a $100 that day, and $200 by the next day?

A Yes, sir.

Q And he also told you you were going to have to pay the rest of it within four months?

A Yes, sir.

Q You were represented by Mel Phillips then, weren't you?

[27] A Yeah.

Q All right. Now, when you sent to see Mr. Mullis to get your papers down there, were you—and at the time the sentence was imposed—were you employed then?

A No, sir.

Q Where were you living then?

A At my mother-in-law's.

Q Where were you living before you were arrested on this probation warrant?

A At my mother's.

Q At your mother's?

A Yes, sir.

Q And how long have you been living with your mother?

A With my mother?

Q Right.

A I don't know, about six months.

Q Six months?

A Yeah. Maybe less.

Q When did you move from your mother-in-law's to your mother's?

A When me and my wife separated.

Q And when was that?

A I don't know, really. I don't know what date it was.

Q Can you guess about how many months ago it was?

A Four, maybe five.

[28] Q Four or five months ago?

A (Witness nods head up and down.)

Q Which would make it about January, end of January, early February?

A It was at the last of the month.

Q End of January or end of February?

A I don't know.

Q Now, you mentioned about five places you went hunting for work, that's five places in the last, let's see, five, eight months?

A No, sir. I went other places. I called Rockwell about—they sent me a letter.

Q What did they say?

A To put my application in back up there in case they started rehiring.

Q All right. And you went to Conger (phonetically)? What was that?

A Joe Willard.

Q One of the other places you mentioned, what was it, Conger?

A Con Agra.

Q Con Agra. Where are they at?

A Dalton.

Q Dalton, And you went to the Dalton High School?

A Yes, sir. I went to Kayo, too.

[29] Q Went to where?

A Kayo on 41.

Q Who did you talk to at the Dalton High School?

A It was the superintendent.

Q Superintendent?

A Yes, sir.

Q Who did you talk to at Salem?

A I never did get in Salem. They wouldn't let me in. They wasn't taking no applications. They wasn't doing any hiring.

Q How many times have you been to the Unemployment Office?

A I went twice in one day.

Q When was that?

A About the 4th of this month.

Q When you entered your plea before Judge Coker, you knew you were going to have to pay that money, didn't you?

A Yes, sir.

Q You agreed to pay it?

A Yes, sir.

Q Did you have any intention of paying?

A Yes, sir. I was going to pay it.

Q Have you made any effort to contact Mr. Mullis since February, since the time you had ran out, to tell him?

A Well, the day when it ran out is the day when I called down there.

[30] Q It was. And you talked to the secretary?

A Yes, sir.

Q And she said he was in Trenton?

A She said she would get in touch with him. I might have assumed he was in Trenton because they was having court down there.

Q How did you know that?

A Because I just left Trenton.

Q Pardon?

A I just left Trenton.

Q You had just left Trenton. And then, you didn't make any other effort to get in touch with him?

A No, sir.

Q He told you when you got your papers that he was over here every Wednesday, didn't he?

A Yes, sir.

Q Did you come—have you ever been by the courthouse since that phone call in February to try and get in touch with him?

A No, sir.

Q Not made any attempt to come by here?

A No, sir.

Q On any other Wednesday he's here?

A No, sir.

Q And he's here every Wednesday?

[31] A I understood that Mr. Snow was down here, too, on Wednesday.

Q Right. Mr. Snow or Mr. Mullis or someone from the Probation Office is here in the courthouse, they told you that, didn't they?

A Yes, sir.

Q And you didn't attempt to come by the courthouse and find any of them?

A No, sir.

Q How do you survive, Mr. Bearden?

A I stay with my mother and them.

Q And they feed you?

A Till I find a job.

Q How long, just how long have you been unemployed?

A Since I got laid off at Rockwell.

Q When was that again?

A About—it was in November, it was right before Christmas.

Q Of nineteen . . .

A Eighty.

Q Have you been through high school?

A No, sir.

Q What was the last grade you attended?

A Ninth.

Q Okay. Are you disabled in any way?

[32] A No, sir.

MR. VAN PELT: No further questions, Your Honor.

THE COURT: All right. Anything further, Mr. Lohr?

REDIRECT EXAMINATION

BY MR. LOHR:

Q Mr. Bearden, have you been able to afford to hire a lawyer to represent you?

A No, sir.

Q Have I been appointed by the Court?

A Yes, sir.

THE COURT: You may step down.

THE WITNESS: Okay.

(Witness excused.)

THE COURT: Anything further?

MR. LOHR: No further witnesses, Your Honor.

THE COURT: Anything in rebuttal?

MR. VAN PELT: Nothing, Your Honor.

MR. LOHR: Your Honor, I just would like to bring a couple of things to the Court's attention before—

THE COURT: (Interposing) Something that's been presented?

MR. LOHR: Just argument. That's all.

THE COURT: I'll hear from you very, very briefly, but it will be briefly.

[33] (Whereupon, counsel for the State of Georgia and counsel for the defendant made closing statements to the Court.)

THE COURT: Of course, Mr. Bearden and Mr. Lohr, it's not my desire to revoke your probation. These matters so far as I am concerned, are the worst part of my job.

Certainly $550 or $5,500 doesn't necessarily mean the difference between you serving a sentence in prison or being on probation, except this Court previously on October the 8th, 1980, ordered these payments to be made as a condition of your probation.

Now, I know that a lot of times it's hard to find work, and I know that there are times when a person really and truly tries, tried hard, and they can't find the type work that they want, or sometimes they can't find any regular work, but yet, almost daily, people go down to the courthouse in Chattooga County, and I'm sure it's true in this county, looking for somebody to do some work for them, maybe mow their grass, maybe do an odd job for which they would pay them some money. They can't find anybody to work. I don't know where those people are looking for work when people who are looking for somebody to work for them.

[34] I'm assuming in this case that one of the conditions of probation was that the defendant report to the Probation Office periodically.

MR. VAN PELT: Yes, sir. That's in the—in S-1.

THE COURT: In S-1.

MR. VAN PELT: I believe it is. It's the same as on the other one. I may be wrong.

THE COURT: I don't see the condition in this sentence requiring this defendant to report to the probation officer every 30 days, but I believe the testimony of the probation officer was that the terms of the condition of probation were explained to him. Is that the testimony or not?

MR. VAN PELT: Yes, sir, I believe it was.

THE COURT: If there is any dispute about it, we can go back on the record and find out what the testimony was. I don't feel that this defendant has really in good faith reported to the probation officer on any type of regular basis.

Mr. Mullis testified in general terms as to what is generally explained to people on probation, and as I recall it, that this defendant was informed of that. Was that the testimony or not?

MR. LOHR: Your Honor, as I remember it, I'm [35] just—from what I'm trying to recollect, that he generally said that the terms of probation were explained, but he did not go into any detail except with respect to the amount of the fine, and the aspect of reporting to the probation officer.

I don't think there was any testimony that that was one of the conditions of probation, nor that that particular part had been explained to him. I don't remember. I'm just trying to go back and remember.

THE COURT: But, the defendant himself testified that he was given some papers, and that his wife read them to him. Is that not right?

MR. LOHR: I believe that was his testimony.

MR. VAN PELT: Yes, sir. We don't have those papers in evidence. I don't know what the contents of them were. I don't know which papers they were.

Your Honor, I believe that there was testimony from Mr. Mullis that Mr. Bearden was written up at the time of the sentence. I don't believe there was any specific date for reporting testified to.

THE COURT: I know that usually, quote, the papers, end of quote, that are given, usually contain those provisions that they're to report, I believe, every 30 days, but I'm not sure.

Mr. Mullis, would you come back to the witness [36] stand please?

JACK MULLIS,

recalled as a witness at the instance of the State of Georgia, being previously duly sworn, was examined and testified further as follows:

MR. MULLIS: Your Honor, I might clear this up to say, now, he mentioned Mr. Snow. Mr. Snow might have written him up, I don't know, because we both serve this county, but usually everybody that's put on probation, Judge Coker several years ago fixed out some rules of probation, and asked us to read these rules to everybody that's put on probation, which I do.

THE COURT: Do you have a copy of the rules that are given to each person that's put on probation?

MR. MULLIS: Yes, sir.

THE COURT: Do you have a copy of that?

MR. MULLIS: Yes, sir.

THE COURT: Would you get a copy of it?

MR. MULLIS: I sure will.

THE COURT: I reiterate, I don't know what's in probation, but if the prior orders of the Court aren't enforced, then I don't know any other way to do it, if they're not complied with, I don't know any other way, Mr. Lohr.

MR. LOHR: Your Honor, I have been in—since [37] I've been involved with this case, I've been in contact with his family and his brother has told me he would do everything possible to get this amount.

THE COURT: Beg your pardon?

MR. LOHR: His brother has told me that he will do whatever he can to get this $550 to pay it for Danny.

Now, when I spoke with him before today, he indicated he would try to have it today, subsequently found out he was not able to obtain it, and it might be possible that this Court would consider giving Mr. Bearden or his family some time, I don't know how much it would take, a few days, in which to pay this off.

There's no dispute that he has not paid it, and did let it slide, but he's willing to pay it, and his family is willing to pay it as soon as they can get the money.

THE COURT: That's well and good, Mr. Lohr, but, of course, the fallacy in that argument is, since October the 8th, 1980, this defendant has known that on or before February the 8th, he was required to pay this.

I know, and I hate to see $550 or the lack of $550, put this boy in prison. I hate to see anybody [38] go to prison when the jury finds them guilty of armed robbery, I hate to see them go to prison, but those are the laws that you're bound by. I'm bound by the same laws.

So, Mr. Bearden, we all live by laws and not of men, and I don't know any way to enforce the prior orders of the Court but one way.

MR. LOHR: Well, I guess my only response to that, Your Honor, would be that the law requiring revocation of probation when an indigent is unable to pay a fine is an invalid law.

THE COURT: I'm well aware of the indigency provision, and I know that there are times when a person doesn't have funds that he's supposed to have, but in any event, the Court finds that this defendant has failed to abide by the previous order of this Court of Judge Coker on October the 8th, 1980, in failing to pay the amount ordered to be paid by Judge Coker, and in further failing to report to the probation officer periodically.

That's the order of the Court.

MR. VAN PELT: Thank you, Your Honor.

THE COURT: Mr. Bearden, I'm sure, or at least I feel confident that Judge Coker explained to you, and probably Mr. Phillips explained to you at the time [39] Judge Coker imposed this first offender's sentence, what it meant.

Do you care to respond to that, Mr. Lohr?

MR. LOHR: Your Honor, I don't know what Mr. Coker has stated and—excuse me—Judge Coker and Mr. Phillips.

I have conferred with Danny, and I told him that as it stands as if he was at the day of his plea, that this Court would sentence him at this time.

THE COURT: Of course, you weren't here and you don't know what was explained to Mr. Bearden at the time of the sentence.

MR. LOHR: Right.

THE COURT: Now, if in fact, if in fact under the case of Stevens versus the State at 245 Georgia Reports, page 835—would someone go to the library, the law library, here, and get 245 Georgia Reports, under the case of Stevens versus the State—unless it was clearly explained to Mr. Bearden that in the event the provisions of this probation were not complied with, that he could be sentenced in the burglary case anywhere from 1 to 20 years, and in the theft by receiving, anywhere from 1 to 10 years, if that was not explained to him by Judge Coker at the time, or written into the sentence at that time, then, of course, the [40] only period of time by which this Court can now revoke the probation would be the remaining portion. He was given three years sentence on October the 8th, 1980.

Are you familiar with the Stevens case, Mr. Lohr?

MR. LOHR: Your Honor, I'm not. What is the page number?

THE COURT: 835. 245 Georgia Reports, page 835. Our Supreme Court has held that the purpose of the first offender's act is to give the defendant another chance to speak.

In the Stevens case, the judge, the sentencing judge, told the defendant that if he brought—if he violated a term of probation, that he would have to serve the remainder of the sentence if he was brought back into court for violation of the terms of the probation.

All right. Mr. Stevens was in fact brought back into court and resentenced and given a longer sentence than the remainder of his original term of sentence, and our Supreme Court has said, you can't do that.

But, if in fact in this case Mr. Bearden was informed by the Court that if he violated the terms of the first offend-

er's act and was brought back into court, the Court at the time Mr. Bearden was brought back could impose a sentence in the burglary case [41] anywhere from 1 to 20 years, and in the theft by receiving case, anywhere from 1 to 10 years, then, of course, this Court at this time could impose a longer sentence than a period from October the 8th up to the present time.

But, I want to make it clear that between October the 8th, 1980, and up to this date, Mr. Bearden will be given credit for that period of time serving that sentence.

Am I making myself clear or am I confusing you more?

Mr. LOHR: No. I understand exactly what you're saying, I believe.

THE COURT: Mr. Lohr, on behalf of the defendant, do you care to confer with the defendant and then respond, or would you prefer that I have the record checked to determine what information and what statements were made to Mr. Bearden at the time he was sentenced?

MR. LOHR: Your Honor, let me confer with him and see if he recalls what is said.

THE COURT: All right. There is a record of it because at the time Mr. Bearden entered his first offender's plea in each of these cases on October the 8th, 1980, there will be a record of it, and we can [42] get it. I don't know which reporter it would have been, but we can get it.

MR. LOHR: Give me just a moment, If you would, please.

THE COURT: All right, sir.

MR. LOHR: Your Honor, I suppose the only way to be sure is to check the record on it. He does not remember what Judge Coker told him specifically which I can, of course, understand, but he cannot testify one way or the other.

THE COURT: All right. The Court at this time then will impose a sentence which will be the sentence that will stand in the event the Judge at that time, Judge Coker, made the proper explanation to him, which I assume he did.

Then, if it develops that the proper explanation was not given to Mr. Bearden at that time, then I will amend the

sentence and comply with the direction of our Supreme Court in the case of Stevens versus the State at 245 Georgia Reports, page 835.

There are several other cases that hold the same thing as the Stevens case, but that's just one that I happened to remember.

All right. Come around, Mr. Bearden, and Mr. Lohr.
[43] As to Case No. 8917, the State versus Danny Bearden for the offense of burglary, now, Mr. Bearden, you understand I'm now sentencing you to prison, the same as Judge Coker could have done on October the 8th, 1980, do you realize that?

MR. BEARDEN: Yes, sir.

THE COURT: It is the sentence of the Court that the defendant, Danny Bearden, serve a period of five years in the State Penitentiary or such other place or places as the Director of the Board of Corrections directs.

As to Case No.—

MR. VAN PELT: (Interposing) 8923.

THE COURT: Is that 8923?

MR. VAN PELT: Yes, sir.

THE COURT: 8923, State versus Danny Bearden for the offense of theft by receiving, it's the sentence of the Court that the defendant serve a period of three years in the State Penitentiary or such other place or places as the Director of the Board of Corrections directs.

However, Case No. 8923 is to be served concurrent with Case No. 8917. You'll be serving both sentences at the same time.

MR. BEARDEN: Yes, sir.
[44] THE COURT: Now, Mr. Bearden, let me explain to you, you have the right to appeal to our Appellate Courts. If you desire to appeal, you must do so within 30 days from this date, and if you do not appeal within 30 days, then you would lose the right to appeal.

If you desire to appeal and you do not have the funds with which to pay a lawyer to appeal your cases, the Court will appoint a lawyer for that purpose.

You also have a right to seek a review of the sentence in Case No. 8917.

Now, if you desire to seek a review of this sentence, you must do so within 30 days or you would lose that right. Do you understand it?

MR. BEARDEN: Yes, sir.

THE COURT: All right. Do you have any questions that you want to ask me?

MR. BEARDEN: No, sir.

THE COURT: All right, sir. Now, I will ask the Court Reporter to ascertain which court reporter was here on October the 8th, 1980, and go back to these two cases where the pleas were entered, and get an excerpt of that portion of what was told by the Court to Mr. Bearden relative to what would happen to him if he violated any of the laws of the State or country, and was brought back into court.

[45] It's very crucial, that point is very crucial, more crucial to Mr. Bearden than anyone else.

All right. This is the sentence of the Court.

(Hearing concluded.)

In the Supreme Court of the United States

No. 81-6633

DANNY R. BEARDEN, PETITIONER,

v.

GEORGIA

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Georgia.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 28, 1982

NO. 81-6633

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

JUN 17 PAGE 9

DANNY R. BEARDEN,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment permit the probation of an indigent defendant to be revoked for failure to pay as directed when completion of his probation under the Georgia First Offenders Act would result, in effect, in his acquittal?

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STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

In the September, 1980 term of the Catoosa County, Georgia, Superior Court, petitioner, Danny R. Bearden, was indicted for theft by receiving stolen property and burglary. It was alleged that the offenses occurred on July 11, 1980 and July 7, 1980, respectively. (Appendix to Petition [hereafter App.] 51, 55). Petitioner pled guilty to both charges and was sentenced on October 8, 1980, under the Georgia First Offenders Act, Ga. Code §§ 27-2727, 2728, to serve one year on probation for the theft by receiving charge and three years on probation for the burglary offense, concurrently. The trial court also sentenced petitioner to pay $200.00 in restitution in the theft by receiving case within four months of October 8, 1980. In the burglary case, appellant was ordered to pay a $500.00 fine and $50.00 in restitution--$100.00 immediately, $100.00 by the next day (October 9, 1980), and the remaining $350.00 within four months of October 8, 1980. The fine and restitution payments were made conditions of probation. (App. 48-53). On May 27, 1981, the State of Georgia petitioned the trial court to revoke petitioner's probation. In the petition, the State claimed that petitioner had failed to pay the "fine and restitution balance of $550.00, which was to be paid on or before February 2, 1981" and that he had committed a burglary on May 10, 1981. (App. 2). A hearing was held on the State's petition on June 3, 1981, in the Catoosa County Superior Court. Petitioner, his wife, and probation officer testified. After the hearing, the trial court found that petitioner had failed to pay and report to his probation officer as directed, revoked his probation, and sentenced him to serve five years

on the burglary charge and three years for the theft by receiving offense, concurrently. But, his sentence was modified by the trial court on September 17, 1981, so as to require him to serve only the remainder of his original probated sentences entered on October 8, 1980. (App. 61-64). The Georgia Court of Appeals upheld the trial court's revocation solely on the trial court's finding that petitioner had failed to pay as directed. (App. 65-68). The Court of Appeals denied a motion for rehearing and on April 8, 1982, the Georgia Supreme Court denied a petition for its writ of certiorari. (App. 69-70).

B. STATEMENT OF FACTS

Petitioner failed to pay as directed by the probation order. With money borrowed from his parents, petitioner paid the $100.00 he was ordered to pay on October 8, 1980 and the $100.00 he was required to pay by October 9, 1980. (App. 14-16, 19, 25). He failed, however, to pay the $550.00 balance during the period allowed by the trial court. (App. 14-16, 18-19, 23-24).

Petitioner offered evidence to the effect that he lacked the financial resources to pay the $550.00 balance. He and his wife testified that he had no job, income, or assets. (App. 22, 27-29). He had not worked since November, 1980, when he was laid off from a Rockwell International plant. (App. 22, 35).

It should be noted that petitioner specifically consented to the probation order. Both petitioner and his trial counsel consented in writing to the order directing payment of the fine and restitutuion. (App. 53, 57, 33).

SUMMARY OF ARGUMENT

The rationality test of equal protection analysis applies to the question presented here. The revocation of petitioner's probation is rationally related to the State of Georgia's legitimate interest in administering probation in a just and socially useful manner, and in admitting to probation only those not likely to continue in criminal conduct. Employment and the related attribute of financial ability are certainly important considerations in assessing the likelihood of continued criminal activity.

ARGUMENT

Petitioner contends that the revocation of his probation violates the Equal Protection Clause of the Fourteenth Amendment.

A. THE PROPER STANDARD OF EQUAL PROTECTION REVIEW

The Equal Protection Clause has been held to require varying levels of scrutiny depending on the classification created by the state action in question. The highest level is called "strict scrutiny" and is invoked whenever a suspect criterion is the basis of the state classification. For example, the Court has held race, Loving v. Virginia, 388 U.S. 1, 9 (1967), and alienage, In Re Griffiths, 413 U.S. 717 (1973), to be suspect criteria. Some cases seem to support the existence of a middle level of scrutiny which requires that classifications which burden constitutionally protected interests be closely related to important or substantial governmental objectives. E.g., Shapiro v. Thompson, 394 U.S. 618 (1969). Finally, the basic equal protection test requires that there be a rational relationship between the purpose of the state action and any classification created by the act.

Wealth has not generally been held to be a suspect criterion. For example, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973), the Court declined to "extend its most exacting scrutiny" to the review of a school-financing system that allegedly discriminated on the basis of wealth. See also, Maher v. Roe, 432 U.S. 461 (1977).

On several occasions the Court has invalidated state procedures which, on the basis of wealth, interfered with a criminal defendant's ability to obtain review of his conviction. For example, in Griffin v. Illinois, 351 U.S. 12 (1956), the Court held that Illinois could not refuse to provide to petitioners, without costs,

a trial transcript when one was necessary in order for them to obtain appellate review of their convictions. Said the Court, "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." Id., at 18 (Emphasis supplied). And, in Douglas v. California, 372 U.S. 353 (1963), the Court invalidated on equal protection grounds California's policy of failing to provide State-paid counsel to indigents for their rightful appeals.

Regardless of whether an enhanced level of scrutiny has been employed to review wealth-based discrimination in criminal trials and direct appeals, only the rationality test should be used to review probation decisions. Unlike the trial and direct appeal, probation is not a part of the crucial fact-finding process. Thus, decisions concerning whom to probate and whose probation to revoke should be evaluated only under the rationality test. Also, it appears that in Tate v. Short, 401 U.S. 395 (1971), and Williams v. Illinois, 399 U.S. 235 (1970), the state procedures employed to imprison indigent defendants were evaluated only under the rationality test.

B. APPLICATION OF THE RATIONALITY TEST IN THE INSTANT CASE.

In order to apply the rationality test, we must first consider the State interest involved in the revocation of petitioner's probation. Under Ga. Code Ann. § 27-2709(c)(Supp. 1981),

> If it appears to court [sic] upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, or may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

Administering probation in accordance with this statute is certainly a legitimate State interest.

Is the revocation of petitioner's probation for non-payment of his fine and restitution amounts rationally related to the State interest described above? This is the central issue presented in this case. Certainly financial ability is a legitimate and important consideration in the decision to probate. Financial means and gainful employment-- which is usually related to financial means--certainly affect the "likel[ihood of a defendant] to engage in a criminal course of conduct" which obviously involves the "ends of justice and the welfare of society." Ga. Code Ann. § 27-2709(c). If financial ability can be considered in making the decision to probate, clearly it can be considered in revocation. If a defendant's financial ability was misrepresented to the court or proved to be less than expected, it might be the case that probation is no longer appropriate under § 27-2709(c). Thus, revocation would be rational in view of the

State interest involved. As the Georgia Supreme Court has held:

> [I]f a defendant's willingness to pay a fine is a factor which provides the court added assurance that the individual is a good risk for probation, the subsequent or later developed fact that the individual cannot pay the fine materially alters the original considerations which went into the judgment. In such a case the judgment has already been made for the defendant -- if the fine cannot be paid, the defendant is not a good risk for probation and the sentence must be served.

Hunter v. Dean, 240 Ga. 214, 219 (1977).

Petitioner's probation was properly revoked. He, a convicted burglar with new burglary charges pending against him, was simply no longer a good probation risk when he lost his job and the ability to pay his modest fine and restitution amounts. Thus, it was rational for the trial court to issue the order of revocation.

The principles embodied in Williams v. Illinois, 399 U.S. 235 (1970), and Tate v. Short, 401 U.S. 395 (1971), do not cast doubt on the constitutionality of the revocation of petitioner's probation. In both cases the criminal defendants were punished beyond state statutory maximums solely because of their inability to pay fines. The question presented here was not reached. In Williams, supra, at 243, the Chief Justice wrote for the Court:

> We hold only that a state may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine . . . . We have no occasion to reach the question whether a state is precluded from holding an indigent accountable for a fine by use of penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.

The Court went on to say that the State cannot fail to enforce fines against indigents because to do so would be "inverse discrimination." Id., at 244. The Court then cited, with approval, statutes of

California, Michigan, and Pennsylvania -- all of which permitted imprisonment in the event of a defendant's failure to pay a fine as directed. Id., at 245 n. 21, 247, 251, 256.

There is disagreement between lower courts on the issue presented here. The Georgia Supreme Court has approved of probation revocation in similar situations. Hunter, supra; Calhoun v. Couch, 232 Ga. 467 (1974). The Fifth Circuit has disagreed. Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977), vacated, 439 U.S. 1041 (1978); United States v. Boswell, 605 F.2d 171 (5th Cir. 1979) (basis of decision unclear). And, at least one other federal court has held probation revocation in such circumstances to be a denial of equal protection. Hutchinson v. Jones, 477 F.Supp. 51, 53 (N.D. Ga. 1979) (specifically disagreeing with Hunter, supra). At some point this conflict should be resolved.

Finally, the effect of the Georgia First Offenders Act should be noted. Under that Act, had petitioner's probation not been revoked he would, had he kept the other conditions, been "completely exonerate[d] . . . of any criminal purpose . . . and . . . not . . . considered to have a criminal conviction." Ga. Code Ann. § 27-2728 (Supp. 1981). Hence, the State interest served by petitioner's revocation is especially strong.

CONCLUSION

Petitioner's probation was not revoked in violation of the Equal Protection Clause. Therefore, the Georgia Court of Appeals has not "decided a federal question in a way in conflict with applicable decisions of this Court." Moreover, no other "special and important reasons" militate in favor of review. S. Ct. Rules 17. Thus, the petition should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81-6633

DANNY R. BEARDEN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIOARI TO THE SUPREME COURT OF GEORGIA

CERTIFICATE OF FILING UNDER RULE 28

I, John C. Walden, a Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on June 1, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

JOHN C. WALDEN

Sworn to and subscribed
before me this 1st day
of June, 1982.

Cheryl J. Mitchell
NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires July 19, 1985

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CLERK

No. 81-6633

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

DANNY R. BEARDEN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Does the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibit the revocation of an indigent defendant's probation for his failure to pay a fine and restitution when that probation is being served under the Georgia First Offender's Act?

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CITATION TO OPINIONS OF COURTS BELOW

There is no written opinion from the trial court or from the Supreme Court of Georgia. The citation for the opinion from the Court of Appeals of Georgia is: *Bearden* v. *State*, ____ Ga. App. ____, 288 S.E.2d 662 (1982).

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals of Georgia sought to be reviewed was dated and entered February 24, 1982. The petitioner filed a timely motion for rehearing which was denied on March 15, 1982. The petitioner subsequently filed a timely petition for writ of certiorari in the Supreme Court of Georgia which was denied on April 8, 1982.

The provisions of 28 U.S.C. § 1257(3) confer upon this Court jurisdiction to review the judgment of the Court of Appeals of the State of Georgia by writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATEMENTS INVOLVED

U.S. Constitution Amendment 14, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code Annotated § 27-2727

> Upon a verdict or plea of guilty or a plea of nolo contendere but before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without enter-

ing a judgment of guilt and with the consent of the defendant, defer further proceeding and place the defendant on probation as provided by the Statewide Probation Act [§§ 27-2702 through 27-2726.1]. Upon violation of the terms of probation, or upon a conviction for another crime, the court may enter an adjudication of guilt and proceed as otherwise provided. No person may avail himself of the provisions of this law [§§ 27-2727 through 27-2732] on more than one occasion.
(Acts 1968, pp. 324, 325.)

Georgia Code Annotated § 27-2728

Upon fulfillment of the terms of probation, or upon release by the court prior to the termination of the period thereof, the defendant shall be discharged without court adjudication of guilt. Such discharge shall completely exonerate the defendant of any criminal purpose, shall not effect any civil right or liberties, and he shall not be considered to have a criminal conviction. Should a person be placed under probation under this law [§§ 27-2727 through 27-2732], a record of the same shall be forwarded to the Georgia Crime Information Center. Without request of the offender, a record of discharge and exoneration, as above provided, shall in every case be forwarded to the Georgia Crime Information Center. In every case in which the record of Probation shall have been previously forwarded to the office of the State Probation System, the Georgia Crime Information Center and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of such offender has not been forwarded as above provided, upon request of the offender or his attorney or representative such record of the same shall be forwarded by the clerk of the Court so as to reflect such discharge and exoneration.
(Acts 1968, pp. 324, 325; 1978, p. 1621, eff. July 1, 1978.)

Georgia Code Annotated § 27-2728.1

> Except as otherwise provided in this law [§§ 27-2727 through 27-2732], a discharge under the provisions of this law is not a conviction of a crime under the laws of this State and may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector. (Acts 1978, pp. 1621, 1622, eff. July 1, 1978.)

Georgia Code Annotated § 2-501

> The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of person shall not be permitted to register, vote or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons.

STATEMENT OF THE CASE

In the 1980 September term of the Superior Court of Catoosa County, Georgia, the Petitioner was indicted for the felonies of burglary and theft by receiving stolen property. (J.A. 1-3, 6-8). Petitioner entered pleas of guilty in both cases, (J.A. 1,6), and was sentenced on October 8, 1980, under the provisions of the Georgia First Offender's Act (GA. CODE ANN. §§ 27-2727 to 2732). (J.A. 4,5,9, 10). The Petitioner was sentenced to serve three years on probation in the burglary case, (J.A. 4), and in the theft by receiving case was given a concurrent one year sentence to be served on probation. (J.A. 9).

The trial court imposed several conditions upon the Petitioner's probation. Among these conditions was the requirement that the Petitioner pay two hundred ($200.00) dollars restitution in the theft by receiving case within four (4) months of October 8, 1980. (J.A. 9). In the burglary case the Petitioner was further ordered to pay a fine of five hundred ($500.00) dollars and fifty ($50.00) dollars restitution; one hundred ($100.00) dollars of which was to be paid immediately, one hundred ($100.00) dollars to be paid the next day (October 9, 1980), and the balance of three hundred fifty ($350.00) dollars to be paid within four (4) months of October 8, 1980. (J.A.4).

On May 29, 1981, the State of Georgia filed a petition in the trial court to revoke the Petitioner's probation. The State's petition alleged that the Petitioner had violated the conditions of his probation by committing a burglary on May 10, 1981,[1] and by failing to make a timely payment of his fine and restitution as ordered under the sentences imposed under the First Offender's Act. (J.A. 11,12). On June 3, 1982, a hearing was held on the State's petition before the Superior Court of Catoosa County. At that hearing the State abandoned the alleged burglary as a ground for revocation of the Petitioner's probation and relied solely on the ground that the Petitioner had failed to pay his fine and restitution as ordered. (J.A. 26). Petitioner's sole defense was that he was indigent and totally unable to comply with the condition of probation requiring him to make payment of a fine and restitution. The Petitioner asserted that to revoke his probation for

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[1] Although it is not a part of the record in this case, Petitioner would state to the Court that after being indicted for this burglary and after a trial on that indictment, a jury found the Petitioner not guilty.

his failure to pay the fine and restitution was in violation of the Equal Protection Clause of the United States Constitution.

After hearing the testimony of the Petitioner, his wife, and a probation officer, and after brief oral argument, the trial court found that the Petitioner violated the conditions of probation by "failing to pay the amount ordered to be paid by Judge Coker, and in further failing to report to the probation officer periodically." (J.A. 45). On these two grounds the court ordered the Petitioner's probation revoked, (J.A. 14,15), and sentenced him to serve a term in the penitentiary.[2]

Since the trial court was unauthorized to revoke Petitioner's probation on a ground not stated in the petition, *Radcliff* v. *State*, 134 Ga. App. 244, 214 S.E.2d 179 (1975), the Georgia Court of Appeals upheld the trial court's revocation solely on the ground that the Petitioner had failed to pay his fine and restitution as ordered. (J.A. 19-21). The Court of Appeals denied a Motion for Rehearing, (Attachment to the Record), and the Georgia Supreme Court denied a Petition for a Writ of Certiorari. (Attachment to the Record). This Court then granted Petitioner's Writ for Certiorari to review this case. (J.A. 50).

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[2] The Trial Court initially sentenced the Petition to serve five years for the offense of burglary, (J.A. 16), and three years to run concurrently for the offense of Theft by Receiving Stolen Property. (J.A. 17). Upon the Petitioner's motion to modify the sentence, the trial court reduced the Petitioner's sentence to the remaining time he originally had to serve on probation. (J.A. 18).

SUMMARY OF ARGUMENT

This Court has previously given consideration to criminal defendants who have been deprived of important rights and benefits solely because of their indigency. With respect to the sentencing phase of the criminal process, it has been held that an indigent defendant cannot receive additional incarceration solely because he is unable to pay a fine. *Tate* v. *Short*, 401 U.S. 395 (1971); *Williams* v. *Illinois*, 399 U.S. 235 (1970). These cases have been held to prevent the jailing of an individual who is financially unable to pay a fine which is a condition of probation. *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977). The application of the principles found in the opinions of this Court and in cases decided by the United States Court of Appeals for the Fifth Circuit require a finding that the revocation of the Petitioner's probation violated the Equal Protection Clause of the Fourteenth Amendment to the United States Consititution. The above cases have not applied a traditional analysis under the Fourteenth Amendment. However, such an analysis leads to the same result.

The Equal Protection Clause requires a state to show that a classification is necessary to achieve a compelling state interest if a classification infringes upon a fundamental right or is to the disadvantage of a member of a suspect class. In such a case the classification must be narrowly drawn. In certain limited circumstances which do not involve a suspect class or fundamental right, this Court will require the state to show a substantial relationship between an important state objective and the classification created by the state. *Plyler* v. *Doe*, 50 U.S.L.W. 4650 (1982). Otherwise, the Equal Protection Clause only requires that the classification be rationally related to some legitimate, articulated objective.

The Petitioner is indigent and totally unable to pay the sum required to receive the benefits of serving his probation under the First Offender's Act. His indigency along with a total deprivation of significant benefits places him in a suspect class. In addition, the revocation of the Petitioner's probation resulted in an adjudication of guilt in two felony cases. This adjudication of guilt deprived the Petitioner of several important and fundamental rights, including the right to vote. Since the Petitioner is a member of a suspect class and because there has been an infringement upon his fundamental rights, strict scrutiny should be applied.

Even if this Court should find that strict scrutiny is not appropriate, the classification still cannot withstand an intermediate or lower level of judicial review. There are no articulated state objectives which are furthered by the revocation of the Petitioner's probation. The State of Georgia exceeded the limits imposed by the Equal Protection Clause and therefore the lower courts should be reversed.

ARGUMENT

At the outset it should be stated that this case does not involve nonpayment by an individual who is capable of paying but simply refuses to abide by a court order. This case, likewise, does not raise the issue as to whether there were any grounds other than the Petitioner's failure to pay his fine and restitution upon which the revocation might have been based.

At the time the order under the First Offender's Act was entered requiring the Petitioner to pay his fine and restitution, the Petitioner knowingly consented to and intended to abide by that order. (J.A. 40). In order to pay the first two hundred ($200.00) dollars which was due

immediately, the Petitioner borrowed that money from his parents. (J.A. 34,35). The Petitioner was employed at a Rockwell International Plant at the time his plea was entered, (J.A. 32), and in November of 1980 the Petitioner was laid off from his job. (J.A. 33,41). The Petitioner, having only a ninth grade education, (J.A. 41), and a limited ability to read, (J.A. 37), was unsuccessful in his continued and extensive efforts to gain employment after he was laid off. (J.A. 32,34,36,39). The Petitioner had absolutely no income or property from which he could obtain sufficient funds to comply with the trial court's order. (J.A. 32,36,37). When the time for payment arrived, the Petitioner, in good faith, notified his probation officer that he was without funds to pay the amounts required. (J.A. 37).

The trial court did not make a specific finding of fact that the Petitioner was indigent and unable to pay his fine and restitution as ordered, but such a conclusion is implied by statements made by the court. For example, the court stated, "I know, and I hate to see $550 or the lack of $550, put this boy in prison". (J.A. 45). The court further stated, "I'm well aware of the indigency provision, and I know that there are times when a person doesn't have funds that he's supposed to have, but in any event, the Court finds that this defendant has failed to abide by the previous order of this Court. . . ." (J.A. 45). The only conclusion that can be drawn from the evidence introduced at the hearing and the findings of the court is that the Petitioner was willing but totally unable to pay the fine and restitution as ordered.

I. The Purpose Of The Georgia First Offender's Act Is To Provide Rehabilitation For A Defendant Without Imposing A Criminal Record And Without Incarceration.

The Legislature for the State of Georgia has enacted particular provisions providing specific benefits to certain individuals who for the first time are found guilty of a criminal offense. This legislation is generally referred to as the First Offender's Act and is available to a defendant only one time. GA. CODE ANN. § 27-2727 (Supp. 1981). After an individual enters a plea of guilty, or is convicted of a criminal offense, the trial court may, if it deems the circumstances appropriate, defer further proceedings and place the defendant on probation. GA. CODE ANN. § 27-2727 (Supp. 1981). If a defendant successfully serves his probation, he is discharged without an adjudication of guilt on the underlying crime. "Such discharge shall completely exonerate the defendant of any criminal purpose, shall not affect any civil rights or liberties, and he shall not be considered to have a criminal conviction." GA. CODE ANN. § 27-2728 (Supp. 1981). Once an individual is discharged his prior plea of guilty "may not be used to disqualify . . . [him] in any application for employment or appointment to office in either the public or private sector." GA. CODE ANN. § 27-2728.1 (Supp. 1981).

If a defendant's probation is revoked he must be credited with the time he successfully spent on probation, however, the Judge may then sentence the defendant to any sentence which could have originally been imposed.[3] *Stevens* v. *State*, 245 Ga. 835, 268 S.E.2d 330 (1980). The

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[3] The crime of burglary carries a maximum sentence of 20 years. GA. CODE ANN. § 26-1601 (Supp. 1981). A felony conviction for Theft by Receiving Stolen Property carries a maximum penalty of 10 years. GA. CODE ANN. §§ 26-1806, 1812.

Judge at the time of placing the defendant on probation under the First Offender's Act and the Order entered by the Court must have made it clear that at the time of resentencing after revocation any sentence which could have been originally imposed may then be given. If that is not made clear to the defendant then the trial court at the time of revocation can only enter an adjudication of guilt and require the defendant to serve the remainder of his original probated time. *Id.* The primary purpose of this scheme is to provide rehabilitation for convicted defendants without incarceration or the stigma of a felony. *State* v. *Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

In the present case the Petitioner has lost significant benefits solely because of his inability to pay the fine and restitution. Specifically, he has lost the conditional liberty he enjoyed while on probation and has further been deprived of certain of his civil rights by the entry of an adjudication of guilt.

II. Criminal Defendants Who Are Indigent Are Not To Be Denied Rights And Benefits Or Subjected To Increased Incarceration Solely Because Of Their Indigency.

"Providing equal justice for poor and rich, weak and powerful alike is an age-old problem". *Griffin* v. *Illinois*, 351 U.S. 12,16 (1956) (footnote omitted). For over two and a half decades this Court has been presented with a variety of issues arising out of classifications of individuals based on wealth. This Court recognizes that the Equal Protection Clause to the United States Constitution provides special protection to an individual who is a member of a "discrete and insular" minority and is restricted in his ability to protect his own interests. *See, Graham* v. *Richardson*, 403 U.S. 365,372 (1971).

Griffin v. *Illinois*, 351 U.S. 12 (1956), initiated the efforts of this Court to remove discrimination against indigent defendants in criminal cases. In that case it was held that the State of Illinois violated the Equal Protection Clause of the Constitution when it refused to provide an indigent with a transcript of the trial proceedings which was necessary for the prosecution of an appeal. Not only must a state make available a method for an indigent to exercise his right to prosecute an appeal, but the state must also provide counsel to assure that the exercise of that right will be meaningful. *Douglas* v. *California*, 372 U.S. 353 (1963).

Based upon the principles enumerated in *Griffin*, *Douglas* and other similar cases, this Court has "pointedly demonstrated that the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process." *Williams* v. *Illinois*, 399 U.S. 235,241 (1970) (footnote omitted). In *Williams*, this Court held that an indigent could not be imprisoned beyond the statutory maximum term for a specific crime to work off a fine which was also imposed as part of his sentence. This Court held that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." *Id.* at 241,242. To do so is a violation of the Equal Protection Clause of the United States Constitution.

Where a state has a fine only policy for traffic offenses an indigent cannot be imprisoned to work off the fines imposed for his violation of those traffic ordinances. *Tate* v. *Short*, 401 U.S. 395 (1971). Quoting from a concurring

opinion by Mr. Justice White in the case of *Morris* v. *Schoonfield*, 399 U.S. 508 (1970), this Court held:

> "the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Tate* v. *Short*, 401 U.S. 395,398 (1971).

Imprisonment for the failure of an indigent to pay his fine under those circumstances did not further any legitimate state purpose.

The principles expressed by this Court in the above cases apply with equal force to situations where indigents are unable to pay a fine which is imposed as a condition of probation. *Wood* v. *Georgia*, 450 U.S. 261 (1981) (White, J., dissenting). (Where it was stated that the State of Georgia exceeded the limits of the Constitution when it revoked a defendant's probation for his failure to make installment payments on a fine.); *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977). (Where it was held a violation of the Equal Protection Clause to condition a probated sentence upon the immediate payment of a fine and court costs when the defendant was financially unable to pay.); *Frazier* v. *Jordan*, 457 F.2d 726 (5th Cir. 1972). (Where it was held that the imprisonment of an indigent defendant for a failure to pay a fine under an alternate sentence of a $17 fine or 13 days in jail was unconstitutional). *Contra*, *Hunter* v. *Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977); *Barnett* v. *Hopper*, 234 Ga. 694, 217 S.E.2d 280 (1975); *Calhoun* v. *Couch*, 232 Ga. 467, 207 S.E.2d 455 (1974).

In the present case the sentencing judge, by placing the Petitioner on probation, found that no imprisonment was necessary to satisfy the penological interest of the State. Once this determination was made, the Equal Protection Clause prevents the State from subjecting this Petitioner to incarceration for his failure to pay a fine. To do so is to invidiously discriminate against the Petitioner solely because he is indigent.

III. Analysis Under The Equal Protection Clause.

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. A correct analysis under the Equal Protection Clause must first begin with an appropriate description of the classification which is alleged to be constitutionally defective. A state law whether statutorily or judicially created need not specifically designate the classification which is challenged. "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin* v. *Illinois*, 351 U.S. 12,17 n.11 (1956).

In the present case the law of Georgia categorizes individuals who are serving a probated sentence conditioned upon the payment of a fine (or restitution or cost) into two classes; i.e. those who pay and those who don't. The law treats those two classes differently. Specifically, those who pay and otherwise abide by the other conditions of their probation retain their liberty. Those who do not pay go to jail.

It is conceivable that the class which is subject to imprisonment may itself be composed of two types of individuals—those who are able to pay but simply refuse to abide by the order of the court and those who are unable to pay because of their indigency. For the purpose

of this argument, the Petitioner assumes that there is no constitutional infirmity when a court revokes a defendant's probation for a willful failure to pay his fine. The constitutional infirmity of the classification by the State of Georgia is that the class of individuals subject to having their probation revoked is overbroad and overinclusive. Specifically, it includes those individuals who are totally unable to aide by a court's order because of their indigency. In situations where a state must show a compelling state interest the classification must be narrowly drawn and an overinclusive classification will be found to violate the Equal Protection Clause. *E.g.*, *Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

After defining the classification it must then be decided:

> [F]irst, whether . . .[the classification] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicityly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not . . . [the scheme] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination violation of the Equal Protection Clause of the Fourteenth Amendment. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1,17 (1973). *Accord*, *Maher* v. *Roe*, 432 U.S. 464 (1977); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).

Strict judicial scrutiny places upon the state the burden of showing that the classification is necessary to achieve a compelling state interest. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). This state interest must also be legitimate and the classification must be the least intrusive

method of achieving that legitimate compelling interest. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

This two-tier analytical model used by this Court has been subject to criticism because of its rigidity and its failure to require more than a mere rational relationship for significant personal rights and interests which do not pass the test required for strict judicial scrutiny. *E.g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (Marshall, J., dissenting). It has been suggested that this Court has in fact used intermediate standards of review to strike down classifications which do not involve a traditional suspect class or fundamental interest. Gunther, *Forward: In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). In subsequent majority opinions of this Court there appears further support for the argument that intermediate standards of review have been used. *E.g.*, *Craig* v. *Boren*, 429 U.S. 190 (1976) (Where this Court held that "classifications based on gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 197).

A recent majority opinion of this Court appears to have explicitly accepted a new intermediate level of review. In the case of *Plyler* v. *Doe*. 50 U.S.L.W. 4650 (1982), this Court stated:

> In addition [to strict judicial scrutiny], we have recognized that certain forms of legislative classifications, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering

a substantial interest of the State. *Id.* at 4654 (footnote omitted).

This Court struck down the Texas law denying undocumented school-age children free public education because that State failed to show a furtherance of some substantial State interest.

In the present case the Petitioner asserts that strict judicial scrutiny is appropriate. However, even if the Court should apply a lower standard of review the revocation of his probation violates the Equal Protection Clause.

A. Petitioner is a member of a suspect class.

In cases involving indigent criminal defendants this Court has previously failed to analyze the Equal Protection Clause by the two-tier analysis outlined above. However, those cases have made it clear that when an indigent criminal defendant is deprived of some important right or his liberty, considerably more scrutiny will be given to a state's justification than in cases where a state's classifications are subjected to the mere rationality test. In *Griffin* it was stated: "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color." *Griffin* v. *Illinois*, 351 U.S. 12,17 (1956). This statement, along with the language of this Court in the cases following *Griffin*, clearly indicates that important rights of indigent criminal defendants will be given a high degree of scrutiny when they are infringed upon because of that defendant's poverty. Not only has this Court disapproved of state actions adversely affecting indigent criminal defendants but in certain settings wealth classifications which deprive individuals of certain fundamental or important rights have been disfavored. *E.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). Because of the petitioner's poverty he has been denied his liberty and fundamental rights, and

has been treated differently from a nonindigent criminal defendant.

The petitioner recognizes that "[t]his Court has held repeatedly that poverty, standing alone, is not a suspect classification." *Harris* v. *McRae*, 448 U.S. 297,323 (1980); *Accord, San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *Maher* v. *Roe*, 432 U.S. 464 (1977). Clearly, classifications based only on wealth are not sufficient to raise the examination of a state's interest to the level of strict judicial scrutiny. As a result the United States Court of Appeals for the Fifth Circuit has been hesitant to designate an individual who was unable to pay his fine which was imposed as a condition of probation as a member of a suspect class, although the result reached by the Court of Appeals was the same as if that individual was a member of such a class. *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977).

Close consideration should be given to the principles found in the case of *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), in determining whether Petitioner is a member of a suspect class. In *Rodriguez* the Texas Public School Systems provided more money per pupil in districts where more affluent citizens resided than in districts where poor people lived. It was alleged that this discrimination was based on wealth and operated to the disadvantage of those individuals living in the poorer districts. It was alleged that this classification was suspect thus requiring strict judicial scrutiny. However, this Court refused to give such treatment to "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happened to have less taxable wealth than other districts." *Id.* at 28 (footnotes omitted). In the majority holding of the Court, Justice Powell first addressed the

issue of what type of classifications based on wealth have been treated as suspect by this Court. In analyzing the prior decisions of this Court Justice Powell found that impermissible discrimination has been found when two essential factors exist. The first factor requires that the classification contain individuals who "because of their impecunity . . . were completely unable to pay for some desired benefit." *Id.* at 20. The second factor requires that this class of individuals show that as a result of their inability to pay for the benefit they have "sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.* at 20. The opinion of Justice Powell clearly implies that individuals who are unable to pay the prescribed sum required to obtain a desired benefit, and as a result are absolutely precluded from receiving that benefit, would comprise a suspect classification and judicial relief would be proper.

Justice Stewart in an concurring opinion explicitly recognized that in some settings classifications based upon wealth are suspect. Apparently, such would be the situation in a setting of a criminal proceeding where there is "actual or functional indigency". *Id.* at 61 n.6. The dissenting opinion of Justice Marshall, with Justice Douglas concurring, finds that classifications based on wealth do not require the same exacting degree of scrutiny as is required in "classifications based on . . . race or alienage." *Id.* at 121. However, Justice Marshall would have applied an intermediate test requiring "careful judicial scrutiny" of Texas' justifications for this classification based on the wealth of the individuals living in the different school districts. *Id.* at 124.

In the present case the Petitioner meets all the requirements which are stated in *Rodriguez* as necessary to exact strict judicial scrutiny. The petitioner was

functionally indigent. He was totally unable to pay his fine and restitution on which his probation was conditioned. The benefits of probation, which were significant, were completely and absolutely denied to him because of his indigency. The peitioner lost his liberty and freedom, the right to be discharged without a criminal record, the opportunity to retain all of his civil rights and liberties, and the opportunity to be free from disqualification for employment or appointment to office in both the public and private sector. Because of Petitioner's indigency he has been completely deprived of all the benefits available to him while he was serving his probation under the First Offender's Act.

B. Petitioner's inability to pay his fine and restitution deprived him of a fundamental right.

The Petitioner's failure to pay the fine and restitution resulted in the entry of an adjudication of guilt to the felonies of burglary and theft by receiving stolen goods. For the purpose of showing an infringement upon the Petitioner's fundamental rights, it is sufficient to note that the entry of the adjudication of guilt for the above crimes resulted in the Petitioner's loss of his right to vote. GA. CODE ANN. § 2-501. This Court has explicitly held that the right to vote is one of the most fundamental rights and that any infringement upon that right because of an individual's economic status is subject to the highest degree of judicial scrutiny. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). *See*, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Petitioner is aware that his failure to pay the fine and restitution directly related to the entry of the adjudication of guilt, and that it might be suggested that the failure to pay the fine and restitution only indirectly related to the consequential loss of his fundamental right to vote. However, it makes no difference

if the loss of his right to vote was only incidental to the failure to pay the fine and restitution.

In the case of *Bullock* v. *Carter*, 405 U.S. 134 (1972), a candidate for public office was completely unable to pay the required filing fee before his name would be placed upon the ballot. This Court held that the right to become a candidate for public office was not a fundamental right, but that this "exclusionary mechanism" substantially limited the Texas voters "in their choice of candidates." *Id.* at 144. Because of the impact on the voters' fundamental right to vote for a candidate of their own choosing—and this impact is obviously indirect—the Court held that the requirement of the filing fee was subject to strict scrutiny. In the present case the petitioner's fundamental right to vote is more severely and directly affected than were the rights of the Texas voters.

C. There is no sufficient, legitimate state interest which will support the discriminatory classification created by the State of Georgia.

If this Court finds merit in the Petitioner's position that strict judicial scrutiny is to be applied in this case, then the State has the burden of showing that the revocation of the Petitioner's probation was necessary to achieve a legitimate compelling State interest and that the classification drawn by the State was drawn in the lease intrusive method possible. However, even if this Court should apply the lower standard of judicial scrutiny or any intermediate standard, the discrimination against Petitioner cannot be justified. The scheme does not rationally further any "legitimate, *articulated* State purpose".

"The ultimate objective of all criminal laws is the protection of society, and this is as true of the sentencing of offenders as it is of the definition of the specific offenses. . . . The theory of retribution has long been

repudiated, however, and reformation and rehabilitation are today the important goals of criminal correction." Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law And The Constitution*, 22 Vand. L. Rev. 611,612 (1969) (footnotes omitted). This Court has consistently recognized that imprisonment for the failure to pay a fine must further some legitimate penological interest before it can be justified. This Court has held that there is no rational relationship between a state's penological interest and policies and the imprisonment of an indigent bevond the statutory limits of incarceration for the purpose of working off his fine. Once a State has defined the outer limit of incarceration necessary to satisfy its penological interests, this cannot then be exceeded for the failure of an indigent to pay a fine. *Williams* v. *Illinois*, 399 U.S. 235 (1970). The same result is required whether or not the jail term imposed to satisfy the penalogical interest of the State extends beyond the maximum term authorized by statute. A fine cannot be automatically converted into a jail term for an indigent who is unable to pay that fine. *Tate* v. *Short*, 401 U.S. 395 (1971).

The Georgia Legislature has empowered the trial court judges to determine whether or not an individual is a suitable candidate for probation under the First Offender's Act. The placing of an individual on first offender probation reflects a determination by the State that an individual may successfully be rehabilitated and that the penalogical interest of the State will be satisfied without incarceration. A defendant's probation will be revoked only if that individual shows, by the violation of a condition of his probation, that rehabilitation will be unsuccessful while he is on probation.

In the present case Petitioner was faced with the impossible obligation to pay a fine and restitution. By revoking the Petitioner's probation the State has implicitly stated that the Petitioner was unable to be rehabilitated to a useful member of our society because of his impecunity. Consequently, the State found it necessary to enter an adjudication of guilt, remove his civil liberties, including his right to vote, and imprison the Petitioner. When the State, by its actions, enunciates that the poor cannot be rehabilitated, it is relying on an irrational assumption that the poor are a greater criminal threat to society than are the rich. This irrational assumption is the underlying assertion of which *Griffin* and its progeny have disapproved. Petitioner fails to see how his indigency causes him to be a greater danger to society than if he were not indigent. Likewise, the Petitioner fails to see how the State's action in revoking his probation in any way aided in his rehabilitation by making him a better citizen or person. Clearly, the revocation of the Petitioner's probation does not further the primary penological interest of the State.

A state's criminal laws may also assert a punitive and deterrent penological interest. To the extent that the State would assert these interests, this case is indistinguishable from *Tate*. A state's punitive and deterrent interests are no more served by revoking an indigent's probation than by imprisoning an indigent who is unable to pay a traffic fine as in *Tate*. Likewise, the state's interests were no more served in this case than in the case of *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977), where the defendant's probation was revoked for the failure to pay his fine. When the State sentenced the Petitioner under the First Offender's Act there was a recognition that the State's punitive and deterrent interests were sufficiently satisfied wihtout incarceration.

It has been suggested that a state may impose a substitute jail term for the failure of an indigent on probation to pay his fine. However, in such a case it must be made clear that the jail term is "a proper substitute for the fines." *Wood* v. *Georgia*, 450 U.S. 261,287 (1981) (White, J., dissenting). In the present case no such calculation was attempted. At the revocaton hearing, the trial court originally imposed a sentence of five years—two years longer than the original term of probation. Only after the Petitioner's motion and after it appeared to the trial court that the requirements of *Stevens* v. *State*, 245 Ga. 835, 268 S.E.2d 330 (1980), had not been met, was the Petitioner's sentence reduced to the remaining time of his original probation. Under the present case even a partial revocation of the Petitioner's sentence cannot be justified. The benefits which the Petitioner lost when his probation was revoked under the First Offender's Act were very significant. There are many ways available to a state to enforce a fine and restitution without such a severe infringement on an individual's rights and liberties. Through these alternate methods available to the State, the State can sufficiently meet any penal objectives which may be required by the payment of the fine and restitution.

The Georgia Supreme Court has expressed "several reasons justifying the imposition of a lump-sum fine [as a condition of probation], without regard to the ability of the defendant to pay it immediately." *Hunter* v. *Dean*, 240 Ga. 214,216, 239 S.E.2d 791,793 (1977). If a defendant is unable to comply with this type of condition of probation, the Georgia Supreme Court has held that the revocation of probation is justified. That Court stated that when a defendant is placed on probation:

> [T]he judge must decide that the individual defendant is not likely to engage in a continuing course of

> criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. *Id.* at 218, 239 S.E.2d at 794. Accord, GA. CODE ANN. § 27-2709(c) (Supp. 1981).

The gist of the Georgia Supreme Court's rationale is that a poor person who does not pay his fine is not a good candidate for probation because his lack of funds make him more likely to continue in a course of criminal conduct. Again, this is the exact rationale disapproved of in *Griffin*.

At trial a defendant's past conduct is examined. In contrast, when a defendant is considered for probation his future conduct is the primary consideration. In *Griffin* this Court held that wealth has no relationship to a defendant's guilt or innocence. In other words, wealth is unrelated to a defendant's past conduct. The logical extension of this rationale is that a defendant's future conduct, likewise, has no relationship to his wealth or lack of wealth. When an indigent is unable to pay his fine, there is absolutely no reason to believe that this fact alone will cause him to pursue a course of criminal conduct or that he will otherwise be a danger to society.

The Georgia Supreme Court also expressed concern that an individual would express to a court that he could pay a fine and that later he would become unable to make the payment. It has been expressly held that a mistaken misrepresentation of the ability of a defendant to pay a fine is not sufficient to authorize the imposition of an unconstitutional sentence. *Barnett* v. *Hopper*, 548 F.2d 550 (5th Cir. 1977).

IV. There Is No Relevant Distinction Between The Petitioner's Failure To Pay His Fine And His Failure To Pay Restitution.

What has been said regarding the nonpayment of a fine applies equally to the nonpayment of court costs. *Williams* v. *Illinois*, 399 U.S. 235,244 n. 20 (1970). The same rationale shows that the nonpayment of restitution does not raise any greater or more important state interests than does the nonpayment of a fine or court costs. *See*, *Hutchinson* v. *Jones*, 477 F.Supp. 51 (N.D. Ga. 1979). Any State interest in enforcing restitution may be carried out without infringement upon the Petitioner's liberties and fundamental rights.

CONCLUSION

Petitioner was adjudicated guilty of two felonies, stripped of several of his most important rights and imprisoned all because he lost his job and was unable to pay a fine and restitution as previously ordered by the trial court. He was treated differently by the State of Georgia than a similar individual with financial means solely because he was indigent. This different treatment by the State of Georgia is in violation of the Equal Protection Clause of the United States Constitution. For this reason Petitioner respectfully requests that this Court reverse the decision of the Georgia Court of Appeals in this case.

Respectfully submitted,

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NO. 81-6633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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v.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT

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NO. 81-6633

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BRIEF FOR RESPONDENT

STATUTES INVOLVED

In addition to the constitutional and statutory provisions set out by petitioner, this case involves the following statutory provisions:

Ga. Code Ann. § 27-2529 (Supp. 1981): Payment of fine as condition precedent to probation in felony cases

In any case where the judge may, by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion impose a fine on such person so convicted as a condition to such probation. Such fine shall not exceed $10,000 or the amount of the maximum fine which may be imposed for conviction of such a felony, whichever is greater. In any case where probation shall be revoked, the defendant shall not be entitled to any rebate or refund of any part of such fine so paid.

Ga. Code Ann. § 27-2709 (Supp. 1981): [Statewide Probation Act]; jurisdiction of courts; procedure; hearings; reference to circuit probation supervisor; period of probation; disposition of prisoner pending hearing; payment of fines or costs as condition precedent to probation

(a) Any court of this State which has original jurisdiction of criminal actions, except juvenile courts, municipal courts and probate courts where the defendant in a criminal case has been found guilty upon verdict or plea, or who has been sentenced upon a plea of nolo contendere, except for an offense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant.

(b) Prior to such hearing, the court may refer the case to the circuit probation supervisor of the circuit in which such court is located for investigation and recommendation. The court, upon such reference, shall direct the supervisor to make an investigation and report to the court in writing at a specified time upon the circumstances of the offense and the criminal record, social history and present condition of the defendant, together with such supervisor's recommendation, and it shall be the duty of the supervisor to carry out the directive of the court.

(c) If it appears to court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, or may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation. The period of probation or suspension shall not exceed the maximum sentence of confinement which could be imposed upon such defendant except as

provided in sub-section (d).

* * *

(e) The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation.

* * *

(g) The sentencing judge shall not lose jurisdiction over any person placed on probation during the term of said probated sentence, and such judge is hereby empowered to revoke any or all of said probated sentence, rescind any or all said sentence, or in any manner deemed advisable by said judge to modify or change said probated sentence at any time during the period of time originally described for the probated sentence to run.

Ga. Code Ann. § *27-2901* (*Rev. 1978*): *Time of payment of fines*

Every fine imposed by the court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant.

Ga. Code Ann. § *27-3001* (*Supp. 1981*): *Policy*

It is hereby declared to be the policy of this State that restitution by those found guilty of crimes to their victims is a primary concern of the criminal justice system.

Ga. Code Ann. § *27-3002* (*Supp. 1981*): *Definitions*

For the purposes of this Chapter, the following terms shall have the meanings herein ascribed to them unless the context clearly requires otherwise:

(a) The term "board" shall mean the State Board of Pardons and Paroles.

(b) The term "department" shall mean the Department of Offender Rehabilitation.

(c) The term "damages" shall mean all damages which a victim could recover against an offender in a civil action, including a wrongful death action, based on the same act or acts for which the offender is sentenced, except punitive damages and damages for pain and suffering, mental anguish, or loss of consortium.

(d) The term "offender" shall mean any natural person placed on probation under the First Offender Act, sentenced for any crime or any juvenile adjudged delinquent or unruly.

(e) The term "ordering authority" shall mean the court of competent jurisdiction, the State Board of Pardons and Paroles, or the Department of Offender Rehabilitation, or any combination thereof, as is required by the context.

(f) The term "relief" shall mean any suspended or probated sentence including probation imposed under the First Offender Act, any parole or other conditional release from incarceration, the awarding of earned time, the reduction in security status or the placement in prison rehabilitation programs, included, but not limited to, those in which the offender receives monetary compensation.

(g) The term "restitution" shall mean any property or lump sum of periodic payment ordered to be made by any offender to any victim by any ordering authority. Where the victim is a public corporation or governmental entity, or where the offender is a juvenile, restitution may also be in the form of services ordered to be performed by the offender.

(h) The term "restitution order" shall mean any order, decree, or judgment of an ordering authority which requires an offender to make restitution as a condition or term of any relief granted to an offender.

(i) The term "victim" shall mean any natural person or his personal representative, or any firm, co-

partnership, association, public or private corporation, or governmental entity suffering damages caused by an offender's unlawful act.

Ga. Code Ann. § 27-3003 (Supp. 1981): Adults

The judge of any court of competent jurisdiction may order that an adult offender make restitution as a condition of any relief ordered by the court. The State Board of Pardons and Paroles may order that an adult offender make restitution as a condition of any relief ordered by the board. The Department of Offender Rehabilitation may order that an adult offender make restitution as a condition of any relief ordered by the department.

Ga. Code Ann. § 3006 (Supp. 1981): Past restitution considered

Where an offender has made total or partial restitution to a victim, the ordering authority shall consider the fact of such restitution in considering any case within its power.

Ga. Code Ann. § 27-3008 (Supp. 1981): Required findings

(a) In deciding any case subject to this Chapter, the ordering authority shall, before granting any relief, make a written finding either:

(1) That there are no victims to whom restitution should be made under the policy of this State; or

(2) That the circumstances of the case are such that no restitution order or plan is reasonably possible; or

(3) That the offender, in cooperation with the ordering authority, has developed and consented to a plan of restitution which shall be made a part of a restitution order; or

(4) That restitution will be ordered as a condition of the relief.

(b) The failure to make a finding as required by this

section, however, shall not invalidate any order or other action of the ordering authority.

Ga. Code Ann. § 27-3009 (Supp. 1981): Restitution not to exceed damages

The amount of restitution ordered may be equal to or less than, but not more than, the victim's damages.

Ga. Code Ann. § 27-3010 (Supp. 1981): Factors considered

In determining the nature and amount of restitution, the ordering authority shall consider:

(a) The present financial condition of the offender and his dependents;

(b) The probable future earning capacity of the offender and his dependents;

(c) The amount of damages;

(d) The goal of restitution to the victim and the goal of rehabilitation of the offender;

(e) Any restitution previously made;

(f) The period of time during which the restitution order will be in effect;

(g) Other appropriate factors as the ordering authority shall deem to be appropriate.

Ga. Code Ann. § 27-3012 (Supp. 1981): Modification

The ordering authority shall retain jurisdiction to modify a restitution order at any time before the expiration of the relief ordered.

Ga. Code Ann. § 27-3013 (Supp. 1981):

* * *

(c) Failure to comply with a restitution order may be, in the discretion of the ordering authority, grounds to revoke or cancel the relief at any time the restitution order is in effect. When the relief is earned time, the Department of Offender Rehabilitation may sus-

pend the offender from earning earned time for a specified period of time.

Ga. Code Ann. § 27-3016 (Supp. 1981): Peonage; denial of benefits because of poverty

(a) Nothing in this Chapter shall authorize peonage, and this Chapter shall be construed and diligently administered to prevent peonage.

(b) No offender shall be denied any benefit, relief, or privilege to which he might otherwise be entitled or eligible solely because he is financially unable and cannot become financially able to make restitution.

STATEMENT OF THE CASE

With the following additions, respondent accepts petitioner's statement of the case. When petitioner was sentenced to serve probation both he and his counsel consented in writing to the order directing payment of the fine and restitution. (J.A. 4-5, 9-10). At the hearing on the State's revocation petition, it was established that with money borrowed from his parents petitioner paid the $100.00 he was ordered to pay on October 8, 1980 and the $100.00 he was required to pay by October 9, 1980. (J.A. 27-29, 30-31, 34). He failed, however, to pay the $550.00 balance during the period allowed by the trial court. (J.A. 27-29, 30-31, 33). Petitioner and his wife testified that he had no job, income, or assets. (J.A. 32, 35-37). He had not worked since November 1980, when he was laid off from his job at a Rockwell International plant. (J.A. 32, 41).

SUMMARY OF ARGUMENT

This case presents the issue of whether the probation of an indigent defendant may be revoked for failure to comply with probation conditions requiring payment of

a fine and restitution. Petitioner asserts that the revocation violates the Equal Protection Clause of the Fourteenth Amendment. The usual method of resolving such issues is first to decide what standard of equal protection review to employ and then to apply that standard to the case at hand.

The traditional rationality standard of equal protection review should be used in this case. The state action in question is not based on a suspect or other questionable criterion so as to provoke heightened scrutiny. Moreover, no fundamental constitutional right is burdened. Thus, heightened scrutiny under a fundamental rights analysis would also be inappropriate.

The revocation of petitioner's probation satisfies the rationality standard of equal protection review. This standard requires that there be a rational relationship between a legitimate state interest and the state action in question. Probation serves two ligitimate state interests in Georgia: (1) the protection of the public, and (2) the rehabilitation of the offender. In addition, a third state interest is involved in this case: The provision of restitution to crime victims. The revocation of petitioner's probation serves the first interest because petitioner's inability to pay the fine and restitution amounts made him a poorer probation risk and increased the likelihood that he would commit additional crimes. Furthermore, the revocation promotes petitioner's rehabilitation by removing him from circumstances in which the likelihood of his committing a crime had increased. And, the state action in question is consistent with Georgia's policy of promoting restitution. Thus, three legitimate state interests are rationally furthered.

The principles espoused in *Williams v. Illinois*, 399 U.S. 235 (1970), and *Tate v. Short*, 401 U.S. 395 (1971), do not

cast doubt upon the above-stated conclusion. In both of these cases the incarceration periods in question did not serve any penal or other legitimate state interest(s).

Therefore, the state action in question here meets the requirements of the Equal Protection Clause. Hence, the judgment of the Georgia Court of Appeals should be affirmed.

ARGUMENT

Petitioner contends that the revocation of his probation violates the Equal Protection Clause of the Fourteenth Amendment. The Court noted in an earlier case involving similar facts that the question presented here is a "difficult equal protection issue." *Wood v. Georgia*, ___ U.S. ___, 101 S.Ct. 1097, 1099 (1981). Respondent will first discuss the matter of the proper standard of equal protection review to be used and will then deal with the application of that standard to this case.

A. THE PROPER STANDARD OF EQUAL PROTECTION REVIEW

The Equal Protection Clause has been held to require varying levels of scrutiny depending on the nature of the classification created by the state action in question. The highest level is called "strict scrutiny" and is invoked when a suspect criterion is the basis of the state classification. For example, the Court has held race, *Loving v. Virginia*, 388 U.S. 1 (1967), and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971), to be suspect criteria.

A similar level of scrutiny has sometimes been employed when a state classification burdens a fundamental constitutional right. The Court has, for instance, declared statutes unconstitutional which fail to promote compelling governmental interests and which burden the

right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), or right to vote. *Hill v. Stone*, 421 U.S. 289 (1975). This fundamental rights analysis has been called a branch of strict scrutiny review. *Plyler v. Doe*, ___ U.S. ___, 102 S.Ct. 2382, 2394-95 (1982); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1003-05 (1978); J. NOWAK, R. ROTUNDA and J. YOUNG, CONSTITUTIONAL LAW 524-25 (1978).

The Court has also on occasion employed an intermediate standard of review. This standard has been used to evaluate state classifications which "give rise to recurring constitutional difficulties." In order to survive review under this standard, classifications must "further [. . .] . . . substantial interest[s] of the State." *Plyler*, *supra*, at 2395; *see also Caban v. Mohammed*, 441 U.S. 380, 388 (1979). State classifications based on gender, *Craig v. Boren*, 429 U.S. 190 (1964), and illegitimacy, *Levy v. Louisiana*, 391 U.S. 68 (1967) (purporting to employ a rationality standard), have been examined under this intermediate standard.

The basic standard of equal protection review employs only the yardstick of rationality. This standard is used to evaluate "most forms of state action." *Plyler*, *supra*, at 2394; *see also Zobel v. Williams*, ___ U.S. ___, 102 S.Ct. 2309, 2313 (1982). An early statement of the rationality test can be found in *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920):

> [T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Id., at 415, *quoted in Reed v. Reed*, 404 U.S. 71, 75 (1971); *see also McGowan v. Maryland*, 366 U.S. 420 (1961). This least demanding standard, which has been used to review an increased number of state actions in recent years, is not satisfied by cursory scrutiny. G. GUNTER, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). It is not the case, as some have asserted, that this level of review is "largely toothless." L. TRIBE, *supra*, at 1082.

Before taking up the issue of what standard of review should be used to evaluate the state action in question here, several distinctive features of the action should be mentioned. *First*, the facial consitutionally of Georgia's Statewide Probation Act is not, in respondent's view, in doubt. The language of the statute does not classify on the basis of wealth. Respondent assumes that petitioner's attack is, rather, on the application of the statute to him. Presumably, his contention is that the statute has been applied to him in such a way so as to violate the Equal Protection Clause. *See Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). A *second* and related point is that the revocation of petitioner's probation resulted from an individualized state determination and was not brought about by the operation of an inflexible general rule. *See Turner v. Dept. of Employment Security of Utah*, 423 U.S. 44, 46 (1975) ("[w]hen basic human liberties are at stake" legitimate state ends must be achieved through "more individualized means.") In other words, no "irrebuttable presumption" is involved in the state action involved here: Petitioner was permitted to argue and offer evidence against revocation. *See Shapiro, supra*, at 631. In fact, probation is, by nature, an individualized procedure. *Burns v. United*

States, 287 U.S. 216, 220 (1932). *Third*, the state action in question cannot sensibly be called a classification or an instance of differential treatment. Petitioner has not suggested that he has been treated any differently from other Georgia probationers who fail to obey financial conditions of their probation. Rather, petitioner's complaint is that he was *not*, because of his indigency, treated differently. Thus, the State's failure to classify—not a State classification—is involved here. It has been noted that state failures to classify are generally more restitant to constitutional challenge. L. TRIBE, *supra*, at 993-94.

The state action in question here should not be reviewed under the strict or intermediate standards. Generally, those standards are used when suspect or dubious criteria are employed or when fundamental constitutional rights are directly affected. The criteria that provoke heightened scrutiny are, for the most part, immutable characteristics—as race, gender, and illegitimacy. Moreover, the Court has never considered wealth or financial ability, which petitioner asserts was the basis for his probation revocation, to be a suspect criterion or even of such nature as to require intermediate equal protection review. The Court has said, "[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." *Maher v. Roe*, 432 U.S. 464, 471 (1971). *See also San Antonio Independent School District*, *supra*, at 29. Neither does the state action in question here provoke strict scrutiny by burdening a fundamental constitutional right. Indeed, "Probation is . . . conferred as a privilege, and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it be granted on a specified showing." *Burns*, *supra*, at 220, (1932); *see also id.*, at 223 ("proba-

tion is a matter of grace"); *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935). Moreover, it must be considered that probationers, because of their status as law-breakers, do not have the same due process and liberty rights as others. *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Consequently, the conditions of their probation may affect their "ability to exercise constitutionally protected rights." *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979). In fact, "[S]tate[s have] a compelling interest in limiting [probationers'] liberty in order to effectuate their rehabilitation and to protect society." *Owens v. Kelly*, ___ F.2d ___, No. 80-9010, slip. op. at 2267 (11th Cir., August 5, 1982). Because, therefore, there is no right, constitutional or otherwise, to probation,[1] and because probation conditions may limit constitutional rights, it is difficult to see how a state probation decision could for purposes of equal protection review burden the exercise of a fundamental constitutional right. Petitioner suggests nevertheless, that the revocation of his probation should be strictly scrutinized because his fundamental right to vote may be affected. This argument is quite feeble. Petitioner seems to forget that "the sentence was not imposed . . . because of his indigency but because he had committed a crime." *Williams v. Illinois, supra*, at 242. Any effect on petitioner's right to vote will result from his having committed burglary not from his inability to pay a fine and restitution. We are thus led to conclude that neither strict nor intermediate scrutiny should be applied.

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[1] Of course, one has a right under the Equal Protection Clause not to be subjected to the unequal administration of a probation system. However, the Court has recognized that interests without the independent status of fundamental constitutional rights do not achieve that status merely by receiving protection under the Equal Protection Clause. *San Antonio Independent School District, supra*, at 30-34.

The state action involved here should, therefore, be reviewed under the rationality standard. This conclusion is consistent with the Court's decisions. In *Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion), the Court held that Illinois could not refuse to provide a free trial transcript to an indigent criminal defendant when the transcript is necessary for "adequate appellate review." *Id.*, at 19. This decision was based both on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Ross v. Moffitt*, 417 U.S. 600, 608-09 (1974). In *Ross, supra*, the Court said that the right of indigents to meaningful appellate review is best considered under an equal protection analysis. *Id.*, at 611. The Court also in *Ross, supra*, discussed numerous decisions spawned by *Griffin, supra*, and summarized them in this fashion, "Each of these state-imposed financial barriers to the adjudication of a criminal defendant's appeal was held to violate the Fourteenth Amendment." *Ross, supra*, at 607. One of the decisions was *Douglas v. California*, 372 U.S. 353 (1963), in which the Court invalidated on equal protection grounds California's practice of not providing appointed counsel to assist all indigent criminal defendants in their rightful appeals.

Although the structure of the equal protection analysis used in *Griffin, supra*, and its progeny is not entirely clear, it appears that a rationality standard was used. In *Griffin, supra*, the Court said, "Plainly the ability to pay costs in advance bears *no rational relationship* to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Id.*, at 17-18 (plurality opinion) (emphasis added); *id.*, at 21-22 (state cannot make "differentiations" in criminal appellate systems which "have no relation to a rational policy of criminal

appeal") (Frankfurter, J., concurring). In a later case, the Court summarized *Griffin, supra,* and *Douglas, supra,* as follows:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of *unreasoned distinctions* that can only impede open and equal access to the courts. (emphasis added)

Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966).

The conclusion that *Griffin, supra,* and its progeny employ a rationality standard is reinforced by other decisions regarding procedures ancillary to the criminal justice system. In *Ross, supra,* the Court decided an issue left open in *Douglas, supra,* at 356—whether a state must provide counsel to an indigent criminal defendant seeking a discretionary appeal. Noting that in discretionary appeals to the North Carolina Supreme Court from that State's intermediate appellate court the "critical issue is not whether there has been 'a correct adjudication of guilt,' " the Court held that North Carolina is not required by the Equal Protection Clause to provide counsel for such appeals. *Ross, supra,* at 615. The rationality standard was employed. *Id.,* at 612. In several cases concerning state schemes for recoupment of costs for providing legal services to indigent criminal defendants, the Court employed the rationality standard of equal protection analysis. *Fuller v. Oregon,* 417 U.S. 40, 49 (1974); *James v. Strange,* 407 U.S. 128, 140-41 (1972); *Rinaldi, supra,* at 308-09. In *Baxtrom v. Herold,* 383 U.S. 107 (1966), the Court was faced with a New York procedure which treated mentally ill persons who were civilly committed at the end of a prison term more harshly than other mentally ill persons who were civilly committed.

Because there was no "semblance of rationality of the classification" the Court found that the procedure violated the Equal Protection Clause. *Id.*, at 115. Finally, in *McGinnis v. Royster*, 410 U.S. 263 (1973), the Court employed the rationality standard in upholding a New York procedure which denied "good time" credit to state prisoners for their presentence incarceration in county jails. *Id.*, at 270.

If the rationality standard was employed in *Griffin*, *supra*, and its progeny, *a fortiori* it should be used in the instant case. As the Court pointed out in *Griffin*, *supra*, although states are not required by the federal constitution to provide appellate courts, "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Id.*, at 18. Focusing on the law of the state involved in that case, the Court added that "appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant." *Id.* In a later decision the Court explained *Griffin*, *supra*, and *Douglas*, *supra*, as follows, "This Court often has voided state statutes and practices which denied to accused indigents the means to present effective defenses in courts of law." *James*, *supra*, at 134. By contrast, probation decisions do not involve guilt or innocence: They are not part of the fact-finding apparatus. In *Gagnon*, *supra*, the Court acknowledged, "Probation revocation, like parole revocation is not a stage of a criminal prosecution. . . ." *Id.*, at 782. The Court also observed that, "[T]here are critical differences between criminal trials and probation or parole revocation hearings. . . ." *Id.*, at 788-89. And, in *Berman v. United States*, 302 U.S. 211 (1937), the Court said, "Pro-

bation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered." *Id.*, at 220. Thus, if heightened scrutiny has not been applied to state actions which affect the reliability of determinations of guilt, it certainly should not be applied to state probation decisions. Should the Court conclude, however, that state actions of the former sort require closer scrutiny, state probation decisions, nevertheless, should, because of their less critical status, be reviewed only under the rationality standard. *See Ross, supra*, at 612, 615 (rationality standard used to review state practice of not providing appointed counsel for discretionary appeals not critically concerned with correctness of adjudication of guilt).

Neither *Williams v. Illinois, supra*, nor *Tate v. Short*, 401 U.S. 395 (1971), supports the use of heightened scrutiny in the instant case. In both cases the criminal defendants were punished beyond state statutory maximums solely because of their inability to pay fines. Although neither decision speaks in traditional equal protection language, it appears that the analyses are consistent with the rationality standard. The Court discusses in both cases the rationality of the state actions in question. *Williams, supra*, at 239; *Tate, supra*, at 399 (imprisonment serves no "penal objective of the State" and "obviously does not serve" the purpose of "augment[ing] the State's revenues"). Therefore, for this and the above-mentioned reasons, the rationality test of equal protection should be used to review the state action in question here.

B. APPLICATION OF THE RATIONALITY TEST

In order to apply the rationality test, we must first identify the legitimate state interest(s) served by the revocation of petitioner's probation. The Eleventh Circuit has noted:

> The case law of Georgia . . . indicates that two essential purposes of probation in Georgia, as elsewhere are the rehabilitation of the probationer, and the protection of society.

Owens, supra, slip. op. at 2266, *citing State v. Collett*, 232 Ga. 668, 669 (1974), and *Inman v. State*, 124 Ga.App. 190, 192 (1971). The language of the Georgia Statewide Probation Act accommodates these purposes:

> If it appears to court [sic] upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, or may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

Ga. Code Ann. § 27-2709(c) (Supp. 1981). This section mandates that no one be admitted to probation unless it appears that he is "not likely to engage in a criminal course of conduct." Obviously, this requirement aids in the protection of society. And the requirement that it appear that "the ends of justice do not require that the defendant shall presently suffer the penalty imposed by law" accommodates both the rehabilitation of the probationer and the protection of society. A third state interest involved in this case is Georgia's strong interest in restitution. According to a Georgia statute:

> It is hereby declared to be the policy of this State that restitution by those found guilty of crimes to their victims is a primary concern of the criminal justice system.

Ga. Code Ann. § 27-3001 (Supp. 1981).

These three purposes or interests of the State of Georgia are, of course, legitimate. No serious argument to the contrary could be made. Note that these interests are particularly important because they are articulated and not merely conceivable. *McGinnis, supra,* at 270.

The revocation of petitioner's probation is rationally related to Georgia's legitimate interest in administering probation in such a way so as to protect society. This is respondent's primary position. Secondarily, respondent maintains that the revocation rationally furthers petitioner's rehabilitation. Note that the rationality standard does not require that a state classification further all state interests or even the primary state interest. *McGinnis, supra,* at 274-77.

The revocation in question is rationally related to the protection of society in two ways. *First,* petitioner's inability to pay the balance of his fine and restitution altered the trial court's initial determination that he was a good probation risk and not "likely to engage in a criminal course of conduct." Ga. Code Ann. § 27-2709(c) (Supp. 1981). *Second,* the revocation of petitioner's probation helps to protect society by maintaining public confidence in the Georgia criminal justice system. Petitioner will now discuss these two propositions.

Petitioner's inability to pay the balance of his fine and restitution increased the likelihood that he would commit another crime and made him a poorer probation risk than it had first appeared. Although this is not a pleasant con-

clusion for one to draw, it is certainly rational. It should be kept in mind that governmental decisions need not be based on conclusive scientific evidence in order to be rational or constitutional. *See McGinnis, supra,* at 270. With regard to the regulation of obscene materials, which impinges upon preferred First Amendment rights, the Court has said:

> Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could *quite reasonably* [emphasis added] determine that such a connection does or might exist. In deciding *Roth* [*v. United States*, 354 U.S. 476 (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "*the social interest in order and morality.*" (cit. omitted) (emphasis in original)

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973).

There is, nonetheless, considerable data which support the proposition that crime and probation success are related to financial ability and the associated attribute of employment. For example, one study has shown that in the year prior to their arrests, 41.4 percent of inmates of state correctional facilities in 1979 either had no income or income less than $3,000. Similar findings have been made about inmates of local jails. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 463, 485 (1981); *see also id.*, at 488 (1980). The same study established that the associated characteristic of unemployment is also related to incarceration. Fully 29.5 percent of inmates of state correctional facilities in 1979 had been unemployed the year prior to their arrests and another 9.9 percent had worked only part time. Again, similar figures apply to inmates of local jails. *Id.*, at 463, 485 (1981). One study has sug-

gested that the higher arrest rate among blacks than whites is a function not of race or discrimination in law enforcement but of the average lower socio-economic characteristics of blacks, including high unemployment. E. GREEN, *Race, Social Status, And Criminal Arrest*, AMERICAN SOCIOLOGICAL REVIEW 35:476-90 (1970); *see also* U.S. DEPARTMENT OF COMMERCE, CRIME AND EMPLOYMENT ISSUES 86 (1978) ("there is indeed a relationship between unemployment and crime"); M. WOLFGANG, R. FIGLIO, and T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972) (low socio-economic status, including low family income, associated with delinquency); *but see* C. TITTLE & W. VILEMEZ, *The Myth Of Social Class And Criminality: An Empirical Assessment Of The Empirical Evidence*, AMERICAN SOCIOLOGICAL REVIEW 43:643-56 (1978), and studies cited therein. As to the relationship between unemployment and probation success, one study concluded:

> The results of the analysis of 14,385 cases in 19 probation departments show that probationers who were unemployed were universally more likely to violate the terms of their release than probationers who were steadily employed during the entire probation period.
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> * * *
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> [T]he data reveal a distinct trend; with an increase in degree of employment there is an indication of a decrease in the relative frequency of violation.
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> * * *
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> On the basis of this test of importance, steadiness of employment during the probation period is the most important factor in its bearing on probation outcome.

U.S. DEPARTMENT OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES II: 406-07 (1974); *see also* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT CORRECTIONS 27-37 (1967), *reprinted in* R. CARTER & L. WILKINS, PROBATION, PAROLE, AND COMMUNITY CORRECTIONS 104 (1976); R. CLEGG, PROBATION AND PAROLE 27 (1964) (employment also important to success of parole). Thus, the revocation of petitioner's probation is rational because his loss of his job and inability to pay his modest fine and restitution amounts made him a poorer probation risk and made it more likely that he would commit another crime.

The revocation of petitioner's probation also rationally furthers the State's interest in protecting society by maintaining public confidence in Georgia's criminal justice system. If revocation were not permitted petitioner would escape punishment and, because he was sentenced under Georgia's first offenders' procedure, even avoid a conviction. Under Ga. Code Ann. § 27-2728 (Supp. 1981), one who successfully completes first offender's probation is "completely exonerate[d] . . . of any criminal purpose . . . and . . . not . . . considered to have a criminal conviction." Imagine the result if petitioner could misrepresent his financial ability to the sentencing court and then use his indigency like a sword to prevent revocation and obtain an acquittal under § 27-2728. It would not take many such cases to completely destroy public confidence in Georgia's criminal justice system. *See Burns, supra,* at 222.

Respondent's position that financial ability may be

considered in making revocation decisions is symmetrical with the unquestioned authority of states to consider financial ability in the decision to admit to probation. It is widely acknowledged that financial ability is and should be taken into account by a sentencing court when it makes a decision on admission to probation. Fed.R. Crim.P. 32(c)(2); Ga. Code Ann. §§ 27-2709(b), 3010 (a,b) (regarding restitution conditions) (Supp. 1981); R. CLEGG, *supra*, at 166-67; R. CARTER & L. WILKINS, *supra*, at 137-38; DIVISION OF PROBATION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT, *reprinted in* R. CARTER & L. WILKINS, *supra*, at 176f. (recommended pre-sentence report includes detailed information on financial condition and employment), *cited in Williams v. New York*, 337 U.S. 241, 250 n. 15 (1949); R. CARTER & L. WILKINS, *supra*, at 221-22 (average monthly income and employment stability influence federal probation officers' recommendations and the sentences imposed by federal district courts). As the Court observed in *San Antonio Independent School District*, *supra*, "Sentencing judges may, and often do, consider the defendant's ability to pay. . . ." *Id.*, at 22 (dictum). In *Williams v. New York*, *supra*, the Court approved of the use in sentencing of out-of-court information, including financial and employment information. *Id.*, at 250 n. 15. If financial ability may be considered in making the decision to probate, it obviously may rightfully be considered in revocation. The Court has recognized that a sentencing court's wide discretion in deciding whether to admit an offender to probation is not restricted in modification and revocation decisions:

> There is no suggestion in the statute [federal probation act] that the scope of the discretion conferred

> for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former and is in terms equally broad. "The court may revoke or modify any condition of probation, or may change the period of probation.". . . . No criteria for modification are suggested which are in addition to, or different from those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant.

Burns, supra, at 156. This position is in keeping with the "wide discretion" vested in sentencing judges. *Williams v. Illinois, supra*, at 243.

The Georgia Supreme Court has cogently explained how a probationer's inability to meet financial conditions of his probation may affect his acceptability as a probation risk. A defendant's ability to pay a fine may influence a sentencing court's decision on whether he is a good probation risk, according to the Georgia Supreme Court. When it develops that a defendant who has expressed willingness to pay a fine cannot pay his fine this "materially alters the original considerations which went into the judgment." *Hunter v. Dean*, 240 Ga. 214, 219 (1977). The court explained how this development can alter a sentencing court's probation decision:

> [B]efore a sentencing judge makes a decision to probate a sentence, he must determine whether the particular defendant is a good probation risk. Specifically, the judge must decide that the individual defendant is not likely to engage in a continuing course of criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed

> by law. It was the judge's determination in this case, on the basis of the representation made to him, that Ms. Hunter would be a good probation risk should she first pay the fine that was imposed. The fine aspect of the judgment simply does not place the appellant in a position where she is suffering disparate treatment based solely on wealth. On the issue of probation, the fine and ability to pay the fine provided assurances to the trial judge that the probation would be successful.
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> * * *
>
> That wealth may enable a defendant more easily to serve a term of probation successfully, is no doubt an advantage to the wealthy, but, with all other factors equal, if in a particular case the poor defendant is not a good candidate for probation because of a lack of funds, his imprisonment is simply not the result of invidious discrimination; his imprisonment is the result of his being a poor risk for probation.

Id., at 218-19. This reasoning is not matched by any of the federal court decisions which disagree. *Barnett v. Hopper*, 548 F.2d 550 (5th Cir. 1977); *Hutchinson v. Jones*, 477 F.Supp. 51 (N.D. Ga. 1979). Note that all of these cases involve the validity of a lump sum fine—an issue not presented here. Nevertheless the discussions are helpful.

Thus, it can be seen that the revocation of petitioner's probation rationally furthers the State's interest in administering probation in a fashion consistent with the protection of society. This is so because petitioner's loss of his job and inability to pay his fine and restitution balance reduced his chances of successful probation and made it more likely that he would commit another crime.[3]

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[3] Note that under Georgia law petitioner could have moved for modification of his sentences so as to reduce his fine and restitution. Ga. Code Ann. §§27-2709(g), 3012 (Supp. 1981). Although the record shows that petitioner made a motion to modify his sentences so as

In short, he was no longer a good probation risk. Moreover, the revocation helps maintain public confidence in the Georgia criminal justice system. The question here is not whether the revocation decision is wise or enlightened but whether it is rational in view of the state interests involved. Obviously, the decision falls well within the bounds of rationality—it is certainly not irrational, *Vance v. Bradley*, 440 U.S. 93, 111 (1979), or arbitrary, *Ross, supra*, at 607. Any other conclusion would itself be irrational and arbitrary.

Respondent also submits that the State's interest in rehabilitating petitioner is served by his probation revocation. Conditions of probation are usually tailored to limit the temptation to the probationer to commit another crime. *See Inman, supra*, at 193-94. Because, as the above-stated argument makes clear, there is a relationship between crime and probation failure on the one hand and unemployment and financial inability on the other, petitioner's loss of his job and inability to pay his fine and restitution placed him in the position of being easily led to commit another crime. The revocation of petitioner's probation for the balance of his sentence removed him from this temptation.[3]

Moreover, the state action in question should be considered in relation to the state's legitimate interest in seeing restitution made to crime victims. Petitioner was sentenced, under a new Georgia statute, to make resti-

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to receive credit for time spent on probation, it does not show that he moved the trial court to reduce his fine and restitution. (J.A. 18).

[3] Under Ga. Code Ann. §27-2713 (1978 Rev.), in event of revocation, probationers receive credit for the time already spent on probation. Petitioner's sentence was modified on September 17, 1981 so as to reflect this credit. (J.A. 18). Thus, petitioner did receive credit for his probation time.

tution to his victims. Ga. Code Ann. §§ 27-3001, et seq. (Supp. 1981). This statute requires that the financial ability of an offender be considered. Ga. Code Ann. § 27-3010(a, b) (Supp. 1981). It also provides that no offender can be discriminated against under this section because of his poverty:

> (a) Nothing in this Chapter shall authorize peonage, and this Chapter shall be construed and diligently administered to prevent peonage.
>
> (b) No offender shall be denied any benefit, relief, or privilege to which he might otherwise be entitled or eligible solely because he is financially unable and cannot become financially able to make restitution.

Ga. Code Ann. § 27-3016 (Supp. 1981). Petitioner led the sentencing court to believe that he could pay, and consented to pay, restitution. In view of the strong Georgia policy in favor of restitution this no doubt played a part in the court's decision to probate. It eventuated, however, that petitioner could not pay restitution. Thus, the Georgia policy in favor of restitution which it first appeared would be served by petitioner's probation, is not served. Thus, revocation is rational in view of this interest. Of course, petitioner's revocation, when looked at in isolation, does not promote the collection of restitution for his victims. However, the entire course of probation decisions affecting petitioner, is, as explained above, in keeping with the State's interest in restitution.

In deciding this case, the Court should consider the consequences of its decision for probation and other conditional release procedures. If the "wide discretion" of sentencing judges, *Williams v. Illinois*, *supra*, at 243, is curtailed so as to limit their ability to consider employment or financial data in probation decisions, it is likely

that probation and other forms of conditional release will be used less and more offenders will be sentenced to jail. *See, Burns, supra,* at 222; *Hunter, supra,* at 219. As the Georgia Supreme Court observed, "This result . . . does not bode well for the state and defendants, as a class, alike." *Id.*

We are thus led to the conclusion that the revocation of petitioner's probation is rational. Petitioner an admitted burglar with new burglary charges pending against him, was simply no longer a good probation risk when he lost his job and was unable to pay his modest fine and restitution amounts. His failure to obey the financial conditions of probation to which he had agreed[4] forced a reassessment of his probation-worthiness. The sentencing court concluded that in view of these developments petitioner was no longer an acceptable probation risk. Petitioner's probation was not revoked because of his financial inability *per se* but because of the adverse implications of his financial inability for his success on probation and likelihood of not committing additional crimes. Unlike in *Williams v. Illinois, supra,* and *Tate, supra,* in which the states promoted no legitimate penal or other objectives in imprisoning the defendants, petitioner's revocation rationally furthers legitimate state interests. In *Williams, supra,* the states' penal objectives had already been satisfied yet the defendants were punished by additional jail sentences. No such irrational or arbitrary fea-

---

[4] The record does not support the inference that petitioner deliberately misrepresented his financial condition to the trial court. However, as one scholar has observed, "Probationers and parolees are prone to overestimate their capacity for self help." R. CLEGG, *supra,* at 74-75. But, whether petitioner deliberately misled the court or not, it is clear that the trial court sentenced him on the faulty premise that he was financially able to pay a fine and restitution.

tures affect the state action in question here. As outlined above, petitioner's revocation rationally furthers three state interests.

Finally, two other points about *Williams v. Illinois*, *supra*, should be mentioned. *First*, the Court said that states could not fail to enforce fines against indigents because to do would be "inverse discrimination." *Id.*, at 244. In the instant case, such inverse discrimination would be generated if petitioner were allowed not to pay his fine and restitution. *Second*, the Court cited with approval statutes of California, Michigan, and Pennsylvania—all of which permitted imprisonment in the event of a defendant's failure to pay a fine in installments as directed. *Id.*, at 245 n. 21, 247, 256. These points also weigh in favor of respondent's position.

CONCLUSION

For the above-stated reasons, the judgment of the Georgia Court of Appeals should be affirmed.

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CERTIFICATE OF SERVICE

I, GEORGE M. WEAVER, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent upon the Petitioner's attorney by depositing a copy of this brief in the United States mail with proper address and adequate postage to:

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This 14th day of September, 1982.

GEORGE M. WEAVER

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CLERK

No. 81-6633

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

DANNY R. BEARDEN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

On Writ Of Certiorari To
The Court Of Appeals Of Georgia

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The Petitioner was in fact treated differently from other probationers who have sufficient money to pay their fines or restitution. This different treatment, which was based on the Petitioner's indigency, does not rationally advance any of the four legitimate state interests which are outlined in the Respondent's Brief. The failure of the State to show a rational relationship between the State's action and a legitimate state interest demonstrates a violation of the Equal Protection Clause even when the lowest level of judicial scrutiny is applied. However, greater judicial scrutiny is required in this case. If this Court should apply strict scrutiny or an intermediate level of scrutiny, it would appear that both parties would agree that the State's action cannot be upheld.

ARGUMENT

I.

Petitioner Received Different Treatment Because Of His Indigency.

The Respondent asserts that the Petitioner's complaint is not that he was treated differently, but that he should have been treated differently because of his indigency. Of course, whether an individual belongs to a class which is treated differently from other individuals depends upon how the classifications are drawn. It is true that the State of Georgia treats all individuals who have their probation conditioned upon the payment of a fine and restitution the same regardless of an individual's wealth or lack of wealth. All who do not pay are subject to having their probation revoked.

The Equal Protection Clause only requires that all individuals who are similarly situated be treated alike. *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920). To determine the proper description of a classification it must first be decided which individuals are similarly situated. A proper analysis would begin by looking at all individuals to whom a particular state law is applicable. In the present case, this Court should look to all probationers whose probation is con-

ditioned upon the payment of a fine or restitution. The laws of the State of Georgia discriminates and classifies those individuals. The State treats those who do not pay their fine differently from those who do pay.

As previously stated in the Petitioner's Brief, it is assumed that those who are able to pay a fine or restitution imposed as a condition of probation but willfully refuse to obey the order of the sentencing court may legitimately have their probation revoked. It is not suggested by the Petitioner that the discrimination against those individuals is unconstitutional or even undesirable. However, any rationale which may support the revocation of such an individual's probation may not automatically be applied in support of the revocation of an indigent's probation. The crux of the Petitioner's argument is that the class of individuals discriminated against by having their probation revoked in unconstitutionally overbroad and that the revocation of an indigent's probation for the failure to pay a fine or restitution must independently be subjected to analysis under the Equal Protection Clause.

II.

The Different Treatment Offered The Petitioner Did Not Rationally Further Any Legitimate State Interest.

The Respondent asserts the existence of four legitimate State interests which are furthered by the revocation of the Petitioner's probation. These interests can be summarized as follows: (1) the protection of society, (2) the rehabilitation of the petitioner, (3) the maintenance of public confidence in the criminal justice system, and (4) the collection of restitution for the victims of a crime. The Petitioner does not deny that any of the above interests are legitimate, but does deny that they were in any way advanced by the revocation of the Petitioner's probation.

The Respondent appears to first argue that *because* of the Petitioner's indigency, it was justified in revoking the Petitioner's probation for his failure to pay the fine and restitution. It is

suggested that the Petitioner's status as unemployed and his indigency made him a greater threat to society, and that by revoking his probation the State furthered its interest in protecting its citizens. The underlying premise of the argument is that one who becomes unemployed and indigent also becomes more likely to commit a crime. This premise is faulty. First, the Respondent refers to several studies which apparently demonstrate a statistical relationship between criminal activity and low economic status. The fallacy in the argument is that a statistical relationship is interpreted as a causal relationship. Just because a statistical relationship exists between two factors does not necessarily mean that one of the factors causes the other. There may very well exist factors in low socio-economic groups, which are not as prevalent in higher economic groups, that cause or tend to cause criminal activity. However, there is no proof that any such factors are brought into existence because of a lack of wealth. In other words, there is no proof that a lack of wealth causes criminal activity.

Secondly, statistical information does not provide any information about a specific member of a group. As the Respondent recognizes, the revocation of the Petitioner's probation resulted from an individualized state determination. *Respondent's Brief, page* 11. In the present case, there is nothing in the record to support a finding of fact supporting the conclusion that because the Petitioner became unemployed and indigent he also became a greater threat to society. The State of Georgia cannot rely on an unfounded assumption that the Petitioner's change in economic status caused a corresponding change in his propensity to commit criminal acts.

Even if we assume the validity of the Respondent's suggestion that the Petitioner's indigency increased his propensity to commit a crime, this alone is not sufficient to revoke his probation. The ground on which the Petitioner's probation was revoked was his failure to pay the fine and restitution. The Respondent does not, and could not, reasonably argue that the mere fact of non-payment created any threat to society. In-

stead, the Respondent argues that the failure to pay the fine and restitution is the direct result of his indigency which is evidence of an increased likelihood that the Petitioner would commit a criminal act. This chain of reasoning would suggest that the real ground for the revocation of the Petitioner's probation was not the failure to pay the fine and restitution, but is the alleged additional risks imposed upon society by the Petitioner's indigency. With respect to this position it need only be noted that the Petitioner's conditions of probation did not include a condition that he remain employed under all circumstances[1] and not become indigent, nor did they include a condition that his status not change so as to become statistically more likely to commit a criminal act. (J.A. 4,5,9,10). Probation cannot be revoked when there is no material violation of a condition of probation. *See*, OFFICIAL CODE OF GA. ANN. § 42-8-38 (Michie 1982), GA. CODE ANN. § 27-2713 (Harrison 1978). Furthermore, the State of Georgia does not allow the revocation of probation on a ground not stated in the Petition for Revocation. *Eg. Radcliff* v. *State*, 134 Ga. App. 244, 214 S.E.2d 179 (1975).

If the Respondent's reasoning is extended to its logical conclusion, any person who is on probation and becomes unemployed would be subject to having his probation revoked. In fact, any probationer who changed his status so as to become a member of any statistical group that has a higher crime rate would be subject to revocation. It is inconceivable that the Equal Protection Clause of the United States Constitution

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[1] OFFICIAL CODE OF GA. ANN. § 42-8-35(5) (Michie 1982), GA. CODE ANN. § 27-2711(5) (Harrison 1978), allows a court to require a probationer to "[w]ork faithfully at suitable employment insofar as may be possible." This was a condition of the Petitioner's Probation. (J.A. 4,5,9,10). However, there is no suggestion that the Petitioner could have avoided being laid off or could have obtained other suitable employment.

should allow decisions involving a person's liberties to be based upon statistical analysis.

The Respondent does not seriously argue that the revocation of the Petitioner's probation assisted in rehabilitation, except that when the Petitioner was placed in jail the State removed from the Petitioner the temptation to commit a further crime. It would seem reasonable to assume that all probationers have opportunity to commit a crime while on probation. If it is a legitimate rationale that the State may remove such temptations by imprisoning probationers, this would justify the revoking of any individual's probation at any time. In that event, probation would be no more than a gratuity given by the State which could be arbitrarily denied. However, probation is more than an act of grace. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

The Respondent next argues that if the Petitioner were allowed to use his indigency to escape the punishment imposed by the fine and restitution,[2] the public confidence in the criminal justice system would be damaged. In response it need only be noted that the State is not powerless to collect the fine and restitution, *Williams* v. *Illinois*, 399 U.S. 235,242 (1970), or to impose an alternate, equivalent punishment.[3] Furthermore, if

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[2] There is no suggestion that the Petitioner misrepresented his financial ability at the time he was sentenced to probation.

[3] Justice White's dissenting opinion in *Wood* v. *Georgia*, 450 U.S. 261 (1981), suggests that where an indigent cannot pay his fine, his probation may be revoked if the imprisonment imposed is an equivalent substitute for the fine. In the present case it is not clear that the Georgia First Offender Act would allow a partial revocation without an entry of an adjudication of guilt, although that possibility appears to be left open by statute. *See*, OFFICIAL CODE OF GA. ANN. § 42-8-60(b) (Michie 1982), GA. CODE ANN. § 27-2727 (Harrison 1978). If an adjudication of guilt is required before a Trial Court could order imprisonment in lieu of a fine, then for the reasons stated in the Petitioner's Brief, this alternative would not be available in the present case.

the State of Georgia is allowed to place individuals in jail solely because they are too poor to pay a fine or restitution, it would not take many such cases to destroy public confidence in the fairness of such a system. Finally, the State argues that although the revocation of the Petitioner's probation did not further the State's interest in the collection of the restitution and fine imposed in this case, in some way the revocation did advance the State's interest in the enforcement of restitution when the entire course of probation decisions are considered. For two reasons this argument is unpersuasive. First, probation revocation is an individualized decision and each such decision must separately be supported by a legitimate state interest. This, admittedly, is not accomplished in the present case. Secondly, the Petitioner only asserts that those who are totally unable to pay their fine or restitution are subject to invidious discrimination by the revocation of their probation for a failure to pay. Since this class is by definition unable to pay, whether or not the State revokes their probation will not change the fact that restitution will not be collected from this class of individuals.

III.

More Than A Rational Relationship Is Required To Uphold The State's Actions.

The foregoing discusses the secondary issue upon which the parties disagree. Specifically, the Respondent asserts that there exists a rational relationship between four legitimate state interests and the state's action in this case. The Petitioner denies the existence of a rational relationship and asserts that regardless of the standard of review used by this Court the State's action cannot be upheld. The parties also disagree regarding the threshold issue which involves the level of judicial scrutiny to which the State's action must be subjected. The Respondent does not argue that the State's action can withstand strict judicial scrutiny or even an intermediate level of scrutiny. It would appear that if this Court should decide that either of those two levels of review are appropriate, the Re-

spondent would concede that the State's action can not be upheld.

As previously argued in the Petitioner's Brief, the state action in this case operates to the disadvantage of a suspect classification as outlined in the two-prong test set forth in the case of *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). It was also argued that strict scrutiny should be applied because the State's action infringed upon the Petitioner's fundamental rights. In contrast, the Respondent states that any "effect on the petitioner's right to vote will result from his having committed burglary not from his inability to pay a fine and restitution." *Appellant's Brief, Page* 13. Although it is because he was adjudicated guilty of burglary that he has lost this fundamental right, that adjudication of guilt would not have occurred had he paid his fine and restitution. If the Petitioner was not indigent it must be assumed that the fine and restitution would have been paid and his probation would not have been revoked. In that event, Petitioner would not have been adjudicated guilty of a felony and lost his fundamental right to vote. Clearly, the Petitioner's indigency was the cause of the loss of his fundamental rights.

The Respondent distinguishes the case of *Griffin* v. *Illinois*, 351 U.S. 12 (1956) on the ground that an intermediate appellant review addresses critical issues of whether or not there has been a correct adjudication of guilt. In contrast, it is asserted that a probation revocation does not involve the issue of guilt or innocence. Although this is true in most cases of probation revocation, the issue of guilt or innocence is very much involved in the present case. As previously stated, Petitioner's revocation carried with it an adjudication of guilt.

Although there is no statutory or constitutional right to Probation, once an individual is placed on probation he does acquire certain constitutional rights. As this Court stated: "It is clear at least after *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, 295 U.S. 490,492

(1935), that probation is an 'act of grace'." *Gagnon* v. *Scarpelli*, 411 U.S. 778,782 n.4 (1973). Since probation cannot be considered as an act of grace, actions which deprive petitioner of his probation must be required to stand the scrutiny of the Equal Protection Clause.

It is admitted that the cases of *Griffin* v. *Illinois*, 351 U.S. 12 (1956), *Douglas* v. *California*, 372 U.S. 353 (1963), *Williams* v. *Illinois*, 399 U.S. 235 (1970), *Tate* v. *Short*, 401 U.S. 395 (1971) and other cases involving the rights of indigents in the criminal process, did not specifically address the issue of what level of judicial scrutiny was afforded the state actions. However, in footnote 14, in the case of *Plyer* v. *Doe*, ____ U.S. ____, 102 S.Ct. 2382 (1982), the Court recognized several situations which have traditionally invoked a high level of scrutiny. Classifications have been considered suspect where state actions were based on prejudice and persons were not judged individually, where state actions were irrelevant to the achievement of any proper legislative goal, where certain groups have historically been politically powerless, and where a disability was imposed upon a group by circumstances beyond their control. In the present case, Petitioner's revocation was not based upon any personal judgment relating to him except that he was too poor to pay. The revocation of his probation appears to be totally irrelevant to any proper legislative goal. Those who are indigent experience a certain lack of political power. This Court has for over two decades recognized that indigents who are subjected to proceedings before criminal courts must be provided some extraordinary protection. Finally, when a person becomes unemployed and is without funds this is quite often due to circumstances beyond that individual's control. These basic considerations would suggest that the proper construction to give to the prior cases of this Court requires strict judicial scrutiny of the State's rationale for revoking the Petitioner's probation.

In the alternative, Petitioner has asserted that an intermediate level of scrutiny should be applied. The cases of this Court have for a period of time established that indigents in the

criminal process are entitled to certain basic rights. It appears that the determination that indigents in the criminal process are to be given certain preferences is based on well-settled constitutional principles which have been sufficiently established to give them roots throughout the community over a significant period of time. In such situations this Court will apply at least an intermediate standard of review to determine the rationality of the governmental action. *See, Plyer* v. *Doe*, U.S. 102 S.Ct. 2382 n. 16 (1982).

CONCLUSION

For the above reasons the Petitioner respectfully disagrees with arguments presented in the Respondent's Brief.

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